JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 06(i)-06–07 OF 2017 (B)

RICHARD MALANJUM CHIEF JUSTICE, AHMAD MAAROP PCA, ZAHARAH IBRAHIM CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), RAMLY ALI, AZAHAR MOHAMED, ALIZATUL KHAIR, ZAWAWI SALLEH FCJJ AND IDRUS HARUN JCA

10 APRIL 2019

Constitutional Law — Constitution — Infringement of — Whether ss 56 and 57 ('impugned sections') of the Central Bank of Malaysia Act 2009 unconstitutional and void — Whether provisions in impugned sections compelling court hearing an Islamic financial business matter to refer any disputed Shariah issue to Central Bank's Shariah Advisory Council ('SAC') for ruling and to be bound by such ruling usurped court's judicial power to determine that issue itself — Whether SAC's ruling on Shariah issue could have effect of finally determining court action between parties — Whether SAC's determination of Shariah issue had all hallmarks of exercise of judicial power by courts — Whether SAC's existence necessary as civil courts lacked expertise to properly decide questions concerning Shariah law on their own — Whether impugned sections had violated doctrine of separation of powers by usurping judicial power and function of courts

The respondent had granted Islamic credit facilities to the appellant/applicant ('JRI') to finance JRI's leasing of shipping vessels owned by the respondent. When JRI defaulted in paying the amounts due under the facilities, the respondent sued and entered summary judgment against JRI in the High Court for the amount owing. In its appeal to the Court of Appeal ('COA') against the summary judgment, JRI argued that it was unable to generate income from the lease of the vessels because the respondent failed to carry out major maintenance works on the vessels. JRI argued that cl 2.8 in the facilities agreements, which stated that it was JRI's responsibility to carry out and bear the costs of the maintenance of the vessels, contravened the principles of Shariah and, accordingly, the High Court should have sought a ruling on the matter from the Shariah Advisory Council ('SAC') of Bank Negara Malaysia under s 56 of the Central Bank of Malaysia Act 2009 ('the CBMA'). The COA allowed the appeal, set aside the summary judgment and directed the High Court to refer to the SAC for a ruling the question of whether cl 2.8 was Shariah-compliant. After considering the differing expert opinions submitted to it by JRI and the respondent, the SAC notified the High Court of its ruling

— that although, in principle, the respondent should bear the maintenance cost of the vessels as their owner, it was permissible for the contracting parties to negotiate and agree as to who should bear the costs. In effect, the SAC ruled that cl 2.8 was Shariah-compliant. As a result, JRI was obliged to bear the costs of the major maintenance works on the vessels as agreed between the parties. On receiving the SAC's ruling, the High Court fixed the case for trial, but before the trial could commence JRI applied under art 128(2) of the Federal Constitution ('the FC') and s 84 of the Courts of Judicature Act 1964 to have the High Court refer to the Federal Court for its determination the question whether ss 56 and 57 of the CBMA (under which the SAC gave its ruling) was constitutionally valid. The High Court dismissed the application but, on appeal, the COA directed the trial court to make the constitutional reference sought by JRI. In essence, the Federal Court in the instant reference was asked to determine whether by giving the SAC the sole right and power to determine whether cl 2.8 was Shariah-compliant and then requiring the High Court to be bound by the SAC's ruling, ss 56 and 57 of the CBMA had usurped the court's judicial power and function to determine the Shariah issue on its own after considering all the evidence on the point; consequently, whether the provisions of the FC, in particular art 121, had been breached. JRI submitted that it was unconstitutional and against the doctrine of separation of powers for Parliament to assign the court's function of determining the Shariah issue to a non-judicial body like the SAC and, in addition, provide that the court was bound by the SAC's ruling. The respondent and the interveners, on the other hand, submitted that the impugned sections of the CBMA did not vest any judicial power in the SAC; that the SAC's function as a body specialised in Islamic jurisprudence was only to ascertain the Islamic law applicable for the purposes of Islamic financial business and not to determine the dispute that the parties had before the court.

Held, by majority, that ss 56 and 57 of the CBMA were constitutional and did not breach the FC:

(1) **(per Mohd Zawawi Salleh FCJ, majority)** The SAC's ruling under s 57 of the CBMA did not conclude or settle the dispute between the parties arising from the Islamic financing facility at hand. The SAC only 'ascertained' the Islamic law for the purposes of the Islamic financial business and did not 'determine' the liability of the borrower under the facility. The determination of a borrower's liability under any banking facility was decided by the presiding judge and not the SAC (see paras 271, 274 & 276–277).

(2) **(per Mohd Zawawi Salleh FCJ, majority)** The SAC did not have any of the characteristics of judicial power. The duty to ascertain the Islamic law was conferred on the Legislature and the SAC was the Legislature's machinery to assist it in resolving disputes in Islamic banking. It was open to the Legislature to establish the SAC as part of regulatory statute and to

vest it with power to ascertain Islamic law for the purposes of Islamic banking. The SAC did not exercise judicial power at all. Its ruling was solely confined to the Shariah issue. The presiding judge who made the reference to the SAC would exercise his judicial power and decide the case based on the evidence submitted before the court. Since no judicial power was vested in the SAC, it did not usurp the judicial power of the court. The exercise of judicial power did not exist merely because there was an adjudication of an issue (see paras 298, 303, 323 & 326).

(3) **(per Mohd Zawawi Salleh FCJ, majority)** Parliament was competent to vest the function of the ascertainment of Islamic law in respect of Islamic banking in the SAC and to provide that such ascertainment was binding on the court. It was for the court to apply the ascertained Islamic law to the facts of the case. The SAC's ascertainment of the Islamic law did not settle the dispute between the parties before the court. The SAC did not determine or pronounce authoritative decision as to the rights and/or liabilities of the parties before the court and it did not convert the High court into a mere rubber stamp (see para 318).

(4) **(per Mohd Zawawi Salleh FCJ, majority)** The civil courts were not sufficiently equipped to make findings on Islamic law. They were not in a position to appreciate and determine the divergence of opinions among the experts and to decide based on Shariah principles. Since its inception, the SAC had been harmonising the proliferation of Shariah opinions in the industry. There was a need for certainty in the industry on Islamic banking principles. Therefore, the binding nature of the SAC's ruling was justified as s 56 of the CBMA was enacted for the purpose of conserving and protecting the public interest (see paras 329, 332 & 344).

(5) **(per Mohd Zawawi Salleh FCJ, majority)** If parties were allowed to lead expert evidence on Islamic law questions for Islamic financial business, it would fall upon the civil courts to ascertain what the applicable Islamic law was and then proceed to apply the ascertained law to the facts of the case. The practical questions which would then need to be addressed were: (a) what source would a judge refer to; (b) which *mazhab* would the judge adopt if there were differing opinions among the experts; and (c) would civil law or Shariah law be the applicable law. The use of expert evidence would not be helpful to a civil court judge as, ultimately, the judge would have to decide which expert opinion to rely on and this could be further complicated if each expert based his/her opinion on different schools of jurisprudence. It was for a body of eminent jurists, properly qualified in Islamic jurisprudence and/or Islamic finance, to be the ones dealing with questions of validity of a contract under Islamic law and, in Malaysia, that special body was the SAC (see paras 346–348).

(6) **(per Azahar Mohamed FCJ, concurring with majority)** Item 4(k) of

the Federal List, Ninth Schedule of the Federal Constitution empowered Parliament to make laws for the ascertainment of Islamic law and other personal laws for the purposes of federal law. The ascertainment of Islamic law for the purposes of Islamic financial business therefore fell under the legislative's power and therefore the powers and discretion on such matters were neither inherent nor integral to the judicial function. Parliament was legally empowered to assign or delegate its power of ascertaining the applicable Islamic law in relation to any aspect of Islamic financial business to any branch of government or to any administrative body. To that end, Parliament established the SAC to act as the single authority that would ascertain Islamic laws in relation to Islamic financial business to ensure consistency and certainty in the application of Islamic principles in such business. Sections 56 and 57 of the CBMA were introduced in line with Parliament's aim and policy of providing certainty and to prevent incoherent and anomalous decisions in Islamic financial cases. An unsatisfactory feature in the resolution of disputes before the civil courts in the past had been the reliance on various differing sources of Islamic principles (see paras 160, 162, 166–168 & 180).

(7) **(per Azahar Mohamed FCJ, concurring with majority)** Within the framework of the Federal Constitution, the SAC and the courts had to operate with some level of integration if Islamic banking and Islamic financial services in Malaysia were to function well (see para 187).

(8) **(per Azahar Mohamed FCJ, concurring with majority)** Ascertainment of Islamic laws for the purposes of Islamic financial business was a function or power delegated by the legislative branch to the judicial branch and the SAC. As such, the impugned provisions could not and did not trespass or intrude onto the judicial power; the provisions did not violate the doctrine of separation of powers. The principle of separation of powers did not apply to invalidate any legislative delegation of powers to the SAC and the courts to ascertain Islamic law for the purposes of resolving disputes on Islamic financial matters. The Judiciary had not been stripped of its powers and neither had the Executive nor the Legislature usurped or intruded into the sphere of judicial powers (see para 190).

(9) **(per Richard Malanjum Chief Justice, dissenting)** Section 57 of the CBMA had to be struck down as being unconstitutional and void as it contravened art 121 of the Federal Constitution in so far as it provided that any ruling made by the SAC pursuant to a reference was binding on the High Court making the reference. The effect of s 57 was to vest judicial power in the SAC to the exclusion of the High Court on Shariah matters (see para 79).

(10) **(per Richard Malanjum Chief Justice, dissenting)** With the striking

down of s 57 of the CBMA, the High Court ought to accord persuasive weight to any ruling of the SAC pursuant to a reference, taking into account its composition, expertise and special status as the statutory authority for the ascertainment of Islamic law for the purposes of Islamic financial business. The approach to SAC rulings could be similar to the treatment of fatwa of the muftis which had not become law under the respective State Enactments/Ordinances. Courts would ordinarily have no reason to justify the rejection of expert opinion, given that the opinion was expressed by the highest Islamic authority and that judges were not trained in this system of jurisprudence. If a judge disagreed with a particular ruling, he should be at liberty to do so but he should give his/her reasons for not agreeing with the ruling (see paras 80–82).

(11) **(per Richard Malanjum Chief Justice, dissenting)** The SAC's function in this case fell clearly within the core area of judicial power — it exercised an adjudicative function, it finally resolved the dispute on the issue of Shariah law, and it gave a decision which was immediately enforceable. The SAC's ruling was binding not on the parties but on the High Court. It was a decision from which the High Court could not depart. In exercising its function, the SAC was not subject to any check-and-balance mechanism. The SAC's ruling was final with regard to the Shariah issue and it could not be challenged by the parties by contrary expert evidence nor be reviewed by the High Court nor overturned on appeal. In substance, the rights and obligations of the parties would be determined by the SAC's ruling. The High Court could not be said to have retained judicial power by reason of the SAC merely forwarding its ruling to it. The SAC's ruling bound the court and would necessarily be reflected in the order of the court. Because of that binding nature, the SAC's ruling became an integral and inextricable part of the judicial process of determining the rights and liabilities of the disputing parties. It was not permissible for the decision of a non-judicial body to take effect as an exercise of judicial power (see paras 45, 49, 55, 58–59 & 72).

(12) **(per Richard Malanjum Chief Justice, dissenting)** Although the legislative purpose behind the enactment of ss 56 and 57 of the CBMA was commendable, that could not excuse a constitutional transgression and be at the expense of judicial independence and power. The same legislative purpose could have been achieved through other methods that did not involve an infringement of judicial power. For instance, parties to an Islamic finance agreement could agree to submit any disputed question of Shariah law to the SAC for determination and be bound by its decision. Or, the agreement could include a form of 'conclusive evidence clause' stating that the SAC's determination was conclusive evidence of the position of Shariah law so that the court could give effect to the agreement without questioning the correctness of the determination

unless there was fraud, mala fide or manifest error (see paras 74–75 & 77–78).

(13) **(per David Wong CJ (Sabah and Sarawak), dissenting)** Sections 56 and 57 of the CBMA violated the doctrine of separation of powers by clothing a non-judicial body like the SAC with judicial power. JRI's liability in its suit with the respondent turned on whether cl 2.8 of the *Ijarah* agreements was Shariah-compliant. The effect of the SAC's ruling that cl 2.8 was Shariah-compliant was that the parties were bound by that clause and JRI had to bear the costs of the maintenance works. The rights and liabilities of the parties in dispute were adjudicated and finally determined by the SAC. There was no opportunity for the parties to adduce evidence to contradict the SAC's ruling, or to appeal against it. Since the SAC's ruling was binding upon the court, it was artificial to contend that the ruling was not itself enforceable by the SAC as the court had no option but to incorporate and apply the substance and effect of the ruling in making its order and decision. On analysing the substance and true effect of the SAC's role in this case, it was clear that all three elements for the existence of judicial power were present, ie, the exercise of an adjudicative function, finality in resolving the whole dispute and enforceability of the decision (see paras 112, 127, 129–130 & 145).

(14) **(per David Wong CJ (Sabah and Sarawak), dissenting)** With the binding effect of the SAC's ruling on the court, the trial judge's function of analysing conflicting opinions with regard to cl 2.8 was completely usurped. There was a complete prohibition on the part of the judge to determine the legality of cl 2.8. The SAC's ruling was no longer an advice, as it used to be before ss 56 and 57 were enacted. Now, its ruling for all intents and purposes became the ruling of the trial judge. Hence, it had to be said that the legislative purpose here was to take away the judicial power from the civil courts and place it with the SAC on issues related to Shariah matters. The SAC had become very much part of the judicial framework and by providing a ruling that was binding on the courts, it had stepped into the sphere of judicial function which, under the Federal Constitution, was solely reserved to the civil courts (see paras 135–136).

(15) **(per David Wong CJ (Sabah and Sarawak), dissenting)** There was merit in JRI's contention that ss 56 and 57 scuttled a litigant's right to a fair trial and to due process. The SAC's binding ruling deprived JRI of its right to lead evidence and argue that cl 2.8 was forbidden by law and that therefore its liability under the agreement was rendered void. The impugned sections discriminated against a litigant in that the notion that 'all are equal before the law' as encapsulated in art 8 of the Federal Constitution was compromised. The concept of 'rule of law' underpinned the existence of basic human rights provided for in the Federal Constitution and any legislation which impinged on that

concept had to be struck down (see paras 137–138).

(16) **(per David Wong CJ (Sabah and Sarawak), dissenting)** The contention that civil courts were not well-equipped to decide complex issues of Islamic jurisprudence ignored the sole reason for their very existence, which was to adjudicate disputes between parties and to make an informed decision after hearing all relevant evidence including expert opinions and the submissions of the parties; and, with it, there was an appeal framework in place that ensured that a correct decision was arrived at by the apex court of the land (see paras 139–141).

(17) **(per David Wong CJ (Sabah and Sarawak), dissenting)** Sections 56 and 57 of the CBMA had to be struck down and new provisions had to be put in place to redefine the SAC's role in respect of Shariah questions arising in proceedings related to Islamic financial business. The court should have the option to refer questions concerning Shariah to the SAC for its opinion and thereafter parties should be free to lead expert evidence for or against the SAC's opinion. The court should consider the SAC's opinion and all other expert evidence adduced before making a decision. Persuasive weight ought to be given to the SAC's opinion taking into account its special role as a 'statutory expert'. The court should also have the liberty to disagree with the SAC's opinion, giving its reasons for doing so (see paras 143–144).

[Bahasa Malaysia summary

Responden telah diberikan kemudahan kredit *Islamic* kepada perayu/pemohon ('JRI') untuk membiayai pajakan kapal laut JRI yang dimiliki oleh responden. Apabila JRI gagal membayar jumlah yang kena dibayar di bawah kemudahan tersebut, responden telah menyaman dan memasuki penghakiman terus terhadap JRI di Mahkamah Tinggi untuk jumlah yang tertunggak. Dalam rayuannya kepada Mahkamah Rayuan ('MR') terhadap penghakiman terus itu, JRI berhujah bahawa ia tidak mampu menjana pendapatan daripada pajakan kapal-kapal tersebut kerana responden telah gagal menjalankan kerja-kerja penyelenggaraan ke atas kapal-kapal tersebut. JRI berhujah bahawa klausa 2.8 dalam perjanjian kemudahan, yang menyatakan bahawa ia adalah tanggungjawab JRI untuk menjalankan dan menanggung kos penyelenggaraan kapal-kapal tersebut, telah bertentangan dengan prinsip Syariah dan, sewajarnya Mahkamah Tinggi patut memohon keputusan berhubung perkara tersebut daripada Majlis Penasihat Syariah ('MPS') Bank Negara Malaysia di bawah s 56 Akta Bank Negara Malaysia 2009 ('ABNM'). MR membenarkan rayuan itu, mengetepikan penghakiman terus tersebut dan mengarahkan Mahkamah Tinggi merujuk kepada MPS untuk satu keputusan tentang persoalan sama ada klausa 2.8 adalah patuh Syariah. Setelah mempertimbangkan pendapat pakar yang berbeza yang telah dikemukakan kepadanya oleh JRI dan responden, MPS telah memaklumkan keputusannya kepada Mahkamah Tinggi — bahawa meskipun, secara prinsip,

responden patut menanggung kos penyelenggaraan kapal-kapal tersebut sebagai pemiliknya, ia dibenarkan untuk pihak-pihak yang mempunyai kontrak untuk berunding dan bersetuju tentang siapa yang patut menanggung kos itu. Oleh demikian, MPS telah memutuskan bahawa klausa 2.8 adalah patuh Syariah. Akibatnya, JRI bertanggungjawab untuk menanggung kos kerja penyelenggaraan utama untuk kapal-kapal tersebut sebagaimana dipersetujui antara pihak-pihak. Setelah menerima keputusan MPS, Mahkamah Tinggi telah menetapkan kes untuk perbicaraan, tetapi sebelum perbicaraan bermula JRI telah memohon di bawah perkara 128(2) Perlembagaan Persekutuan ('PP') dan s 84 Akta Mahkamah Kehakiman 1964 agar Mahkamah Tinggi merujuk kepada Mahkamah Persekutuan untuk penentuan berhubung persoalan sama ada ss 56 dan 57 ABNM (yang mana di bawahnya MPS telah memberikan keputusannya) adalah sah menurut perlembagaan. Mahkamah Tinggi telah menolak permohonan itu tetapi, atas rayuan, MR telah mengarahkan mahkamah perbicaraan membuat rujukan perlembagaan yang dipohon oleh JRI. Pada asasnya, Mahkamah Persekutuan dalam rujukan ini telah dipohon untuk menentukan sama ada dengan memberikan MPS hak dan kuasa tunggal untuk menentukan sama ada klausa 2.8 adalah patuh Syariah dan kemudian menghendaki Mahkamah Tinggi terikat dengan keputusan MPS itu, ss 56 dan 57 ABNM telah merampas kuasa dan fungsi kehakiman mahkamah untuk menentukan isu Syariah dengan sendirinya selepas mempertimbangkan kesemua keterangan tentang perkara tersebut; akibatnya, sama ada peruntukan-peruntukan PP, terutamanya perkara 121, telah dilanggari. JRI berhujah bahawa ia tidak berperlembagaan dan bertentangan dengan doktrin kuasa pengasingan untuk Parlimen menetapkan fungsi mahkamah untuk menentukan tentang isu Syariah tersebut kepada badan bukan kehakiman seperti MPS dan, tambahan pula, memperuntukkan bahawa mahkamah adalah terikat dengan keputusan MPS. Responden dan pencelah-pencelah, sebaliknya, telah berhujah bahawa seksyen-seksyen ABNM yang dipersoalkan tidak memberikan apa-apa kuasa kehakiman pada MPS; bahawa fungsi MPS sebagai badan pakar yang khusus dalam jurisprudens Islam hanya untuk memastikan undang-undang Islam terpakai bagi tujuan perniagaan kewangan Islam dan bukan untuk menentukan pertikaian yang dikemukakan pihak-pihak di hadapan mahkamah.

Diputuskan, dengan majoriti, bahawa ss 56 dan 57 ABNM adalah berperlembagaan dan tidak melanggar PP:

(1) **(oleh Mohd Zawawi Salleh HMP, majoriti)** Keputusan MPS di bawah s 57 ABNM tidak memutuskan atau menyelesaikan pertikaian antara pihak-pihak yang timbul daripada kemudahan kewangan Islam. MPS hanya 'memastikan' undang-undang Islam bagi tujuan perniagaan kewangan Islam dan tidak 'menentukan' liabiliti peminjam di bawah kemudahan itu. Penentuan liabiliti peminjam di bawah mana-mana

kemudahan perbankan diputuskan oleh hakim yang bersidang dan bukan MPS (lihat perenggan 271, 274 & 276–277).

(2) **(oleh Mohd Zawawi Salleh HMP, majoriti)** MPS tidak mempunyai apa-apa ciri berhubung kuasa kehakiman. Kewajipan untuk memastikan undang-undang Islam diberikan kepada Badan Perundangan dan MPS adalah jentera Badan Perundangan untuk membantunya menyelesaikan pertikaian dalam perbankan Islam. Ia terbuka kepada Badan Perundangan untuk menubuhkan MPS sebagai sebahagian daripada statut pengawalseliaan dan untuk memberinya kuasa memastikan undang-undang Islam bagi tujuan perbankan Islam. MPS tidak melaksanakan kuasa kehakiman langsung. Keputusannya terhad hanya kepada isu Syariah. Hakim bersidang yang membuat rujukan kepada MPS akan melaksanakan kuasa kehakimannya dan memutuskan kes berdasarkan keterangan yang dihujahkan di hadapan mahkamah. Oleh kerana tiada kuasa kehakiman diberikan kepada MPS, ia tidak merampas kuasa kehakiman mahkamah. Pelaksanaan kuasa kehakiman tidak wujud hanya kerana terdapat adjudikasi suatu isu (lihat perenggan 298, 303, 323 & 326).

(3) **(oleh Mohd Zawawi Salleh HMP, majoriti)** Parlimen adalah kompeten untuk memberikan fungsi penentuan hukum Islam berkaitan perbankan Islam dalam MPS dan untuk memperuntukkan bahawa penentuan sedemikian adalah mengikat mahkamah. Ia adalah untuk mahkamah mengguna pakai undang-undang Islam yang ditentukan itu kepada fakta kes. Penentuan MPS berhubung hukum Islam tidak menyelesaikan pertikaian antara pihak-pihak di hadapan mahkamah. MPS tidak menentukan atau mengisytiharkan keputusan yang autoritatif mengenai hak dan/atau liabiliti pihak-pihak di hadapan mahkamah dan ia tidak menjadikan Mahkamah Tinggi hanya sebagai badan yang mengesahkan (lihat perenggan 318).

(4) **(oleh Mohd Zawawi Salleh HMP, majoriti)** Mahkamah sivil tidak dilengkapi secukupnya untuk membuat dapatan berhubung undang-undang Islam. Ia bukan dalam kedudukan untuk menghargai dan menentukan perbezaan pendapat di kalangan pakar dan untuk memutuskan berdasarkan prinsip Syariah. Sejak penubuhannya, MPS telah menyelaraskan percambahan pendapat Syariah dalam industri. Terdapat keperluan tentang kepastian dalam industri berkenaan prinsip perbankan Islam. Oleh itu, sifat mengikat keputusan MPS adalah wajar kerana s 56 ABNM telah digubal bagi tujuan memelihara dan melindungi kepentingan awam (lihat perenggan 329, 332 & 344).

(5) **(oleh Mohd Zawawi Salleh HMP, majoriti)** Sekiranya pihak dibenarkan untuk mengemukakan keterangan pakar berhubung persoalan undang-undang Islam untuk perniagaan kewangan Islam, ia terletak kepada mahkamah sivil untuk memastikan undang-undang

Islam yang berkenaan dan kemudian untuk terus menggunapakai undang-undang yang ditentukan untuk fakta-fakta kes itu. Soalan-soalan praktikal yang perlu ditangani seterusnya adalah: (a) apakah sumber yang akan dijadikan rujukan hakim; (b) *mazhab* manakah yang akan digunapakai oleh hakim jika terdapat perbezaan pendapat antara para pakar; dan (c) adakah undang-undang sivil atau undang-undang Syariah yang merupakan undang-undang yang terpakai. Penggunaan keterangan pakar tidak akan membantu hakim mahkamah sivil kerana, pada akhirnya, hakim perlu memutuskan untuk bergantung kepada pendapat pakar yang mana dan ini mungkin lebih rumit jika setiap pakar berdasarkan pendapatnya kepada pandangan jurisprudens yang berbeza. Ia adalah untuk badan ahli *fiqh* terkemuka, yang layak dalam bidang perundangan Islam dan/atau kewangan Islam, menjadi orang yang berurusan dengan persoalan kesahihan kontrak di bawah undang-undang Islam dan, di Malaysia, badan khas itu adalah MPS (lihat perenggan 346–348).

(6) **(oleh Azahar Mohamed HMR, bersetuju dengan majoriti)** Item 4(k) Senarai Persekutuan, Jadual Kesembilan Perlembagaan Persekutuan memberi kuasa kepada Parlimen untuk penentuan undang-undang Islam dan undang-undang peribadi lain untuk tujuan undang-undang persekutuan. Penentuan undang-undang Islam untuk tujuan perniagaan kewangan Islam oleh itu jatuh di bawah kuasa perundangan dan oleh itu kuasa dan kebijaksanaan mengenai perkara-perkara tersebut tidak wujud atau tidak penting dalam fungsi kehakiman. Parlimen berkuasa secara sah untuk memberikan atau mewakilkan kuasanya untuk memastikan undang-undang Islam yang berkenaan berhubung dengan apa-apa aspek perniagaan kewangan Islam kepada mana-mana cawangan kerajaan atau mana-mana badan pentadbiran. Untuk itu, Parlimen menubuhkan MPS untuk bertindak sebagai pihak berkuasa tunggal yang akan memastikan undang-undang Islam berhubung dengan perniagaan kewangan Islam untuk memastikan ketekalan dan kepastian dalam penerapan prinsip-prinsip Islam dalam perniagaan sedemikian. Seksyen 56 dan 57 ABNM diperkenalkan sejajar dengan matlamat dan dasar Parlimen untuk memastikan kepastian dan untuk menghalang keputusan yang tidak sepatutnya dan anomalous dalam kes-kes kewangan Islam. Ciri-ciri yang tidak memuaskan dalam resolusi pertikaian sebelum mahkamah sivil pada masa lalu telah bergantung pada pelbagai sumber Islam yang berlainan (lihat perenggan 160, 162, 166–168 & 180).

(7) **(oleh Azahar Mohamed HMR, bersetuju dengan majoriti)** Dalam rangka Perlembagaan Persekutuan, MPS dan mahkamah perlu beroperasi dengan beberapa tahap integrasi jika perbankan Islam dan perkhidmatan kewangan Islam di Malaysia berfungsi dengan baik (lihat perenggan 187).

(8) **(oleh Azahar Mohamed HMR, bersetuju dengan majoriti)** Pengukuhan undang-undang Islam untuk tujuan perniagaan kewangan Islam adalah fungsi atau kuasa yang diwakilkan oleh cawangan perundangan ke cawangan kehakiman dan MPS. Oleh itu, peruntukan yang tidak boleh dilakukan dan tidak melanggar atau menghalang kuasa kehakiman; peruntukan itu tidak melanggar doktrin pengasingan kuasa. Prinsip pengasingan kuasa tidak terpakai untuk membatalkan mana-mana perwakilan kuasa undang-undang kepada MPS dan mahkamah untuk memastikan undang-undang Islam untuk tujuan menyelesaikan pertikaian mengenai perkara-perkara kewangan Islam. Badan Kehakiman tidak dilucutkan kuasa dan tidak ada Eksekutif atau Badan Perundangan yang merampas atau mencerobohi bidang kuasa kehakiman (lihat perenggan 190).

(9) **(oleh Azahar Mohamed HMR, bersetuju dengan majoriti)** Seksyen 57 ABNM terpaksa dilucutkan sebagai tidak berperlembagaan dan tidak sah kerana ia melanggar perkara 121 Perlembagaan Persekutuan setakat yang memperuntukkan bahawa apa-apa keputusan yang dibuat oleh MPS menurut rujukan adalah mengikat Mahkamah Tinggi membuat rujukan. Kesan s 57 adalah untuk melengkapkan kuasa kehakiman di MPS untuk mengecualikan Mahkamah Tinggi mengenai perkara Syariah (lihat perenggan 79).

(10) **(oleh Richard Malanjum Ketua Hakim Negara, menentang)** Dengan kejatuhan s 57 ABNM, Mahkamah Tinggi sepatutnya memberi berat persuasif kepada mana-mana keputusan MPS menurut rujukan, dengan mengambil kira komposisi, kepakaran dan status khas sebagai kuasa statutori untuk menentukan undang-undang Islam untuk tujuan perniagaan kewangan Islam. Pendekatan kepada keputusan MPS mungkin sama dengan rawatan fatwa mufti yang tidak menjadi undang-undang di bawah Enakmen/Ordinan Negeri masing-masing. Mahkamah biasanya tidak mempunyai sebab untuk membenarkan penolakan pendapat ahli, memandangkan pendapat itu dinyatakan oleh pihak berkuasa tertinggi Islam dan bahawa hakim tidak dilatih dalam sistem perundangan ini. Sekiranya hakim tidak bersetuju dengan keputusan tertentu, dia harus diberi kebebasan untuk berbuat demikian tetapi dia harus memberikan alasannya untuk tidak bersetuju dengan keputusan tersebut (lihat perenggan 80–82).

(11) **(oleh Richard Malanjum Ketua Hakim Negara, menentang)** Fungsi MPS dalam hal ini jatuh dengan jelas dalam bidang teras kuasa kehakiman — ia melaksanakan fungsi adjudikatif, akhirnya menyelesaikan pertikaian mengenai isu hukum Syariah, dan memberikan keputusan yang segera dapat dikuatkuasakan. Keputusan MPS tidak mengikat pihak-pihak tetapi di Mahkamah Tinggi. Ia adalah keputusan yang mana Mahkamah Tinggi tidak boleh berlepas. Dalam

menjalankan fungsinya, MPS tidak tertakluk kepada sebarang mekanisme semakan dan imbangan. Keputusan MPS adalah muktamad berhubung dengan isu Syariah dan ia tidak boleh dicabar oleh pihak-pihak dengan keterangan ahli yang bertentangan atau tidak diperiksa oleh Mahkamah Tinggi atau dibatalkan atas rayuan. Secara substansinya, hak dan kewajipan pihak-pihak akan ditentukan oleh keputusan MPS. Mahkamah Tinggi tidak boleh dikatakan telah mengekalkan kuasa kehakiman oleh sebab MPS hanya menyampaikan keputusannya kepadanya. Ketetapan MPS mengikat mahkamah dan semestinya akan tercermin dalam perintah mahkamah. Kerana sifat mengikat itu, keputusan MPS menjadi sebahagian daripada proses kehakiman yang penting dan tidak dapat dielakkan untuk menentukan hak dan liabiliti pihak-pihak yang berselisih. Tidak dibenarkan untuk keputusan badan bukan kehakiman berkuatkuasa sebagai kuasa kehakiman (lihat perenggan 45, 49, 55, 58–59 & 72).

(12) **(oleh Richard Malanjum Ketua Hakim Negara, menentang)** Walaupun tujuan perundangan di sebalik penggubalan ss 56 dan 57 dari ABNM itu dapat dipuji, itu tidak boleh membiarkan pelanggaran perlembagaan dan mengorbankan kebebasan dan kuasa kehakiman. Tujuan perundangan yang sama dapat dicapai melalui kaedah lain yang tidak melibatkan pelanggaran kuasa kehakiman. Sebagai contoh, pihak-pihak kepada perjanjian kewangan Islam boleh bersetuju untuk mengemukakan apa-apa persoalan mengenai undang-undang Syariah kepada MPS untuk penentuan dan terikat dengan keputusannya. Atau, perjanjian itu boleh termasuk satu bentuk 'klausa bukti muktamad' yang menyatakan bahawa penentuan MPS adalah bukti muktamad tentang kedudukan hukum Syariah agar mahkamah dapat melaksanakan perjanjian tanpa mempersoalkan ketepatan penentuan kecuali ada penipuan, mala fide atau kesilapan nyata (lihat perenggan 74–75 & 77–78).

(13) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Seksyen 56 dan 57 ABNM melanggar doktrin pengasingan kuasa dengan memakai badan bukan perundangan seperti MPS dengan kuasa kehakiman. Tanggungjawab JRI dalam samannya dengan responden merujuk sama ada klausa 2.8 dari perjanjian *Ijarah* adalah patuh Syariah. Kesan keputusan MPS yang klausa 2.8 adalah patuh Syariah adalah bahawa pihak-pihak yang terikat dengan klausa itu dan JRI harus menanggung kos kerja penyelenggaraan. Hak dan liabiliti pihak-pihak dalam pertikaian telah diadili dan akhirnya ditentukan oleh MPS. Tidak ada peluang bagi pihak-pihak untuk mengemukakan bukti bertentangan dengan keputusan MPS, atau merayu terhadapnya. Memandangkan keputusan MPS telah mengikat mahkamah, ia adalah tidak wajar untuk menegaskan bahawa keputusan itu tidak boleh dikuatkuasakan oleh MPS kerana mahkamah tidak mempunyai pilihan tetapi untuk

memasukkan dan menggunakan asas dan kesan perintah dalam membuat keputusan dan keputusannya. Apabila menganalisis asas dan kesan sebenar peranan MPS dalam kes ini, adalah jelas bahawa ketiga-tiga elemen untuk kewujudan kuasa kehakiman hadir, iaitu pelaksanaan fungsi adjudikatif, muktamad dalam menyelesaikan pertikaian dan penguatkuasaan keputusan (lihat perenggan 112, 127, 129–130 & 145).

(14) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Dengan kesan mengikat keputusan MPS di mahkamah, fungsi hakim perbicaraan untuk menganalisis pendapat yang bertentangan dengan klausa 2.8 telah sepenuhnya dirampas. Terdapat larangan yang lengkap di pihak hakim untuk menentukan kesahihan klausa 2.8. Ketetapan MPS tidak lagi menjadi nasihat, sebagaimana dahulu sebelum ss 56 dan 57 telah dilakukan. Sekarang, keputusannya untuk semua maksud dan tujuan menjadi keputusan hakim perbicaraan. Oleh itu, perlu dinyatakan bahawa tujuan perundangan di sini adalah untuk menghapus kuasa kehakiman dari mahkamah sivil dan meletakkannya dengan MPS mengenai isu yang berkaitan dengan perkara Syariah. MPS telah menjadi sebahagian besar daripada kerangka kehakiman dan dengan memberikan keputusan yang mengikat mahkamah, ia telah melangkah ke dalam lingkup fungsi kehakiman yang, di bawah Perlembagaan Persekutuan, hanya dirizabkan kepada mahkamah sivil (lihat perenggan 135–136).

(15) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Terdapat kebaikan dalam pertentangan JRI yang ss 56 dan 57 membantah hak litigan untuk perbicaraan yang adil dan untuk proses yang sewajarnya. Ketetapan SAC yang melarang JRI hak untuk memimpin keterangan dan berpendapat bahawa klausa 2.8 dilarang oleh undang-undang dan oleh itu tanggung jawabnya di bawah perjanjian itu telah dibatalkan. Bahagian-bahagian yang dibantah didiskriminasi terhadap seorang litigant dalam pengertian bahawa 'semua adalah sama sebelum undang-undang' sebagaimana yang terkandung dalam perkara 8 Perlembagaan Persekutuan telah dikompromikan. Konsep 'kedaulatan undang-undang' membuktikan kewujudan hak asasi manusia asas yang disediakan dalam Perlembagaan Persekutuan dan mana-mana undang-undang yang menyangkut konsep itu perlu dipukul (lihat perenggan 137–138).

(16) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Perbalahan bahawa mahkamah sivil tidak dilengkapi dengan baik untuk memutuskan isu-isu kompleks perundangan Islam mengabaikan satu-satunya sebab kewujudan mereka, iaitu untuk mengadili perselisihan antara pihak-pihak dan membuat keputusan berdasarkan keputusan setelah mendengar semua bukti yang relevan termasuk pendapat pakar dan penyerahan pihak-pihak; dan, dengan itu, terdapat

rangka kerja rayuan di tempat yang memastikan bahawa keputusan yang betul telah tiba di mahkamah puncak tanah (lihat perenggan 139–141).

(17) **(oleh David Wong HB (Sabah dan Sarawak), menentang)** Seksyen 56 dan 57 ABNM perlu dibatalkan dan peruntukan baru perlu disediakan untuk mentakrifkan peranan MPS berkenaan dengan soalan-soalan Syariah yang timbul dalam prosiding yang berkaitan dengan perniagaan kewangan Islam. Mahkamah harus mempunyai pilihan untuk merujuk soalan mengenai Syariah kepada MPS atas pendapatnya dan selepas itu pihak-pihak harus bebas untuk memimpin bukti pakar untuk atau terhadap pendapat MPS. Mahkamah harus mempertimbangkan pendapat MPS dan semua bukti pakar lain yang dikemukakan sebelum membuat keputusan. Berat persuasif sepatutnya diberikan kepada pendapat MPS dengan mengambil kira peranan istimewanya sebagai 'pakar statutori'. Mahkamah juga harus mempunyai kebebasan untuk tidak bersetuju dengan pendapat MPS, memberikan sebab-sebabnya untuk berbuat demikian (lihat perenggan 143–144).]

Notes

For cases on infringement of constitution, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2603–2607.

Cases referred to

A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department [2005] 3 All ER 169; [2004] UKHL 56, HL (refd)

Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67, HC (refd)

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)

Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party) [2008] 5 MLJ 631, HC (refd)

Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd [2008] 6 MLJ 295, HC (refd)

Associated Cement Companies Ltd v PN Sharma And Another 1965 AIR 1595, SC (refd)

A-G of Commonwealth for Australia v R and Boilermakers' Society of Australia [1957] AC 288, PC (refd)

Bangkok Bank Ltd v Cheng Lip Kwong [1990] 2 MLJ 5, HC (refd)

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)

Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad & Ors [2001] MLJU 125, HC (refd)

Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297, FC (refd)

Boilermakers' Society of Australia, Ex parte (1956) 94 CLR 254 (refd)

Botswana Railways' Organization v Setsogo 1996 BLR 763 (refd)

A *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1, HC (folld)
Chng Suan Tze v Minister of Home Affairs & Ors and other appeals [1988] 1 SLR 132, CA (refd)
Cooper v Wilson and others [1937] 2 KB 309, CA (refd)
B *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257, FC (refd)
Director of Public Prosecutions of Jamaica v Mollison [2003] 2 AC 411, PC (refd)
Dato Bentara Luar Decd Haji Yahya bin Yusof & Anor v Hassan bin Othman & Anor, Re [1982] 2 MLJ 264, FC (refd)
C *Durga Shankar Mehta v Thakur Raghuraj Singh And Others* 1954 AIR 520, SC (refd)
Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation (1926) 38 CLR 153; [1926] ALR 339, HC (refd)
Hinds v The Queen [1977] AC 195, PC (refd)
D *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330, HC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Jayantilal Amrit Lal Shodhan v FN Rana And Others 1964 AIR 648; 1964 SCR
E (5) 294, SC (refd)
JW Hampton, Jr & Co v United States 276 US 394 (1928), SC (refd)
Kesavananda Bharati & Ors v The State of Kerala & Ors 1973 AIR 1461, SC (refd)
Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other
F *appeals* [1997] 3 MLJ 23, CA (refd)
Kihoto Hollohan v Zachillhu and others AIR 1993 SC 412, SC (refd)
Labour Relations Board of Saskatchewan v John East Iron Works Ltd [1949] AC 134, PC (refd)
Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ
G 101; [2007] 5 CLJ 253, FC (refd)
Liyanage and others v The Queen [1967] 1 AC 259, PC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Lynham v Butler (No 2) [1933] IR 74, HC (refd)
Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] 7 MLJ 249, HC (refd)
H *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389, HC (refd)
Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo [2014] 1 MLJ 718, CA (refd)
Mellifont v Attorney-General (Queensland) (1991) 104 ALR 89; (1991) 173 CLR 289, HC (distd)
I *Mohammad Faizal bin Sabtu v PP* [2012] 4 SLR 947, HC (folld)
Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor [2011] 3 MLJ 26; [2011] 4 CLJ 654, HC (refd)
National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development 2016 (1) SACR 308 (refd)

Ong Ah Chuan v PP [1981] AC 648, PC (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1; [2007] 6 CLJ 341, FC (refd)
Palling v Corfield (1970) 123 CLR 52, HC (refd)
Palmer v Ayres (in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)) and others (2017) 341 ALR 18; [2017] HCA 5, HC (folld)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission (1982) 43 ALR 449, HC (refd)
Prentis v Atlantic Coast Line Co (1908) 211 US 210, SC (folld)
PP v Dato' Yap Peng [1987] 2 MLJ 311; [1987] CLJ Rep 284, SC (refd)
PP v Lau Kee Hoo [1983] 1 MLJ 157, FC (refd)
Queen Victoria Memorial Hospital v Thornton [1953] 87 CLR 144 (refd)
R (on the application of Anderson) v Secretary of State for the Home Department [2002] 4 All ER 1089; [2002] UKHL 46, HL (refd)
R v Coates [2004] 1 WLR 3043 (refd)
R v Davison [1954] ALR 877; (1954) 90 CLR 353, HC (folld)
R v Kirby; ex p Boilermakers' Society of Australia (1956) ALR 163, HC (refd)
R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd [1970] ALR 449; (1970) 123 CLR 361, HC (folld)
R (Wexford County Council) v Local Government Board [1902] 2 IR 349 (refd)
Regina (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837, CA (refd)
Regina v Young (Trevor) [2004] 1 WLR 1587, CA (refd)
Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others 1987 AIR 1023, SC (refd)
Rizeq v Western Australia (2017) 344 ALR 421, HC (refd)
Rola Co (Australia) Pty Ltd v The Commonwealth (1944) 69 CLR 185, HC (refd)
S v Dodo 2001 SACR 594 (CC) (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (distd)
Shell Company of Australia, Limited v Federal Commissioner of Taxation [1931] AC 275, PC (refd)
Springer v Government of the Philippine Islands 277 US 189 (1928), SC (refd)
State of Gujarat Revenue Tribunal Bar Association 2012 10 SCC 353 (refd)
Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354; [2009] 2 CLJ 54, FC (refd)
Tan Eng Hong v Attorney-General [2012] 4 SLR 476, CA (refd)
Tan Seet Eng v Attorney-General and another [2016] 1 SLR 779, CA (refd)
Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd [2012] 7 MLJ 597; [2012] 3 CLJ 249, HC (refd)
Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2009] 6 MLJ 416; [2010] 4 CLJ 388, HC (refd)

Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd [2013] 3 MLJ 269, CA (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)
The Bharat Bank Ltd, Dehli v Employees of the Bharat Bank 1950 AIR 188, SC (refd)
The State (at the Prosecution of Martin O'Rourke) v James A Kelly and The Attorney General [1983] IR 58, SC (refd)
Tracey; ex parte Ryan, Re (1989) 84 ALR 1, HC (refd)
United States v Brown 381 US 437 (1965), SC (refd)
Utkal Contractors and Joinery Pvt Ltd and others v State of Orissa and others 1987 AIR 1454, SC (refd)
Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1932) ALR 22, HC (refd)
Virindar Kumar Satyawadi v The State of Punjab AIR 1956 SC 153 (refd)
Wait, In re [1927] 1 Ch 606, CA (refd)
Waterside Workers Federation v JW Alexander Ltd (1918) 25 CLR 434, HC (refd)
Wilson v Minister for Aboriginal & Torres Strait Islander Affairs (1996) 189 CLR 1, HC (refd)

Legislation referred to

Australian Constitution [AU] s 51
Banking and Financial Institutions Act 1989 (repealed by the Financial Services Act 2013) s 124, 124(7)
Bombay Reorganisation Act 11 of 1960 [IND] ss 5A, 6(1)
Central Bank of Malaysia Act 1958 (repealed by the Central Bank of Malaysia Act 2009) ss 3, s 16B, 16B(8), (9)
Central Bank of Malaysia Act 2009 s 2, 5(1), (2), (2)(f), (4), 51, 52, 53, 53(1), (2), 55, 56, 56(1), (1)(b), (2), 57
Child Act 2001
Competition Act 2010 s 44
Contracts Act 1950 s 24
Courts of Judicature Act 1964 s 84
Criminal Law Amendment Act 105 of 1997 [SA] s 51(1), (3)(a)
Customs Act 1967
Employment Act 1955
Federal Constitution arts 4, 8, 74, 121, 121(1), (1A), (1B), (2), 128(2), Part IX, Ninth Schedule, List I, items 4(k), 7, List II
Gun Court Act 1974 [UK]
Housing Act 1966 [IR] s 62, 62(3)
Income Tax Assessment Act 1922–1925
Indian Constitution [IND] arts 226, 227, 258(1)
Industrial Relations Act 1967 s 21
Islamic Banking Act 1983 (revoked by the Islamic Financial Services Act 2013)

Islamic Financial Services Act 2013 s 28(i)
Land Acquisition Act 1 of 1894 [IND] s 4(1)
Land Acquisition Act 1960 s 40D
Misuse of Drugs Act [SG]
National Service Act 1951 [AUS] s 49(a)
Racial Discrimination Act 1975 [AUS]
South Africa Constitution [SA] s 35(3)(c)

Malik Imtiaz Sarwar (Pradeep Nandrajog, Chan Wei June, Dinesh Nandrajog, Clinton Tan Kian Seng and Aliff Benjamin with him) (Nandrajog) for the appellant.
Yoong Sin Min (Samuel Tan Lih Yau and Sanjiv Naddan with her) (Shook Lin & Bok) for the respondent.
Mohd Johan Lee (Muhamad Nakhaie bin Ishak with him) (J Lee & Assoc) for the first intervener.
Cyrus Das (Abdul Rashid Ismail and Siti Nurani Zahidi with him) (Rashid Zulkifli) for the second interveners.

Richard Malanjum Chief Justice (delivering dissenting judgment):

INTRODUCTION

[1] I have read the written judgments in draft of my learned brothers Mr Justice Mohd Zawawi Salleh and Mr Justice Azahar Mohamed. With due respect I am unable to agree with their reasons and conclusions. I have also read the written judgment in draft of Justice David Wong Dak Wah. I agree with his reasons and conclusion. However, in view of the importance of the issues involved in this reference I should also state my reasons for supporting the conclusion arrived at by Justice David Wong Dak Wah. Basically my reasons revolve in the context of the Federal Constitution ('the FC') on issues involving the proper understanding and interpretation of these concepts, namely:

(a) separation of powers vis a vis judicial independence;

(b) rule of law; and

(c) judicial power.

THE DOCTRINE OF SEPARATION OF POWERS

[2] Constitutions based on the Westminster model are founded on the underlying principle of separation of powers, with which the drafters are undoubtedly familiar. Nevertheless, '(I)f you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan',

A the provisions of the Constitution cannot but indicate an intention to confine the exercise of legislative, executive, and judicial power to the respective branches of government (see: *R v Kirby; ex p Boilermakers' Society of Australia* (1956) ALR 163).

B **[3]** Indeed, the separation of powers is a logical inference from the arrangement of the constitution itself, the words in which the powers are vested, and the careful and elaborate provisions defining the repositories of the respective powers. 'This cannot all be treated as meaningless and of no legal consequence ... It would be difficult to treat it as a mere draftsman's C arrangement' (see: *R v Kirby; ex p Boiler makers' Society of Australia*; *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1932) ALR 22).

[4] As such, while the FC does not expressly delineate the separation of D powers, the principle is taken for granted as a constitutional fundamental. The absence of express words in the FC prohibiting the exercise of a particular power by a different branch of government does not by any means imply that it is permitted. As articulated by Lord Diplock in *Hinds v The Queen* [1977] AC 195 at p 212:

E > It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the Legislature. As respects the judicature, particularly if it is intended F that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. *Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial* G *powers of the new state being exercisable exclusively by the Legislature, by the executive and by the judicature respectively.* (Emphasis added.)

[5] Similar sentiment was expressed by Lord Pearce in *Liyanage and others v The Queen* [1967] 1 AC 259 at p 287 when he said this:

H > These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the Executive or the Legislature. *The* I *Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the Executive or the Legislature.* (Emphasis added.)

THE RATIONALE

[6] The fundamental reason for the division of the powers of government into three branches is to ensure a proper mechanism of checks and balances, in order to avoid tyranny or arbitrary government. Since the 18th Century Montesquieu, the classic proponent of the principle of separation of powers, cautioned against the great danger if judicial power is joined with either legislative or executive power:

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

(See: Charles Montesquieu, *The Spirit of the Laws* (1748) Book XI, Ch 6 at p 293).

[7] He went on to warn that, 'there would be an end of everything' should all three powers be united in the same body. His reasoning is this: 'whilst the Legislature is concerned solely with declaring 'the general will of the state' and the Executive with 'nothing more than the execution of that general will', only the Judiciary applies the laws to particular persons. Consequently, the true definition of despotism is the uniting of this power with the other two.' (see: Richard Bellamy, *The Rule of Law and the Separation of Powers,* Routledge, 2017 (London: Routledge, 2016) at p 261).

[8] Our court too had expressed similar view on the importance of checks and balances to maintain the rule of law. In the case of *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297 at p 316 this court said this:

> With due respect, a piece of legislation passed by Parliament or State Assembly may be the will of the majority but it is the court that must be the conscience of the society so as to ensure that the rights and interests of the minority are safeguarded. For what use is there the acclamation: 'All persons are equal before the law and entitled to the equal protection of the law' (art 8 of the FC) when it is illusory. If an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The court will therefore assist and uphold a citizen's constitutional rights.

[9] Thus, 'the separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital — not merely a matter of government mechanism' (per Sutherland J in *Springer v Government of the Philippine Islands* 277 US 189 (1928) at p 201). The separation of powers is a necessary device to provide security against the gradual concentration of power and to control the abuse of government. The

A government must be obliged to control itself. The aim is to divide and arrange the branches of power in such a manner *that each may be a check on the other (see: James Madison, The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments,* The Federalist Papers No 51 (1788)).

B

[10] Accordingly, in distributing the powers of government, it is essential that 'all the parts of it form a mutual check upon each other. The three parts, each part regulates and is regulated by the rest' (see: Blackstone, *Commentaries* Vol 1, 1765/1979 at p 154). Under this system, 'if a given policy can be C implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will' (see: *United States v Brown* 381 US 437 (1965) at p 443).

D

SEPARATION OF JUDICIAL POWER FROM LEGISLATIVE/EXECUTIVE POWER

[11] Countries adopting the Westminster model of government do not E subscribe to an absolute separation of powers. It has been observed that the separation between legislative and executive powers is not rigid: the Executive, for instance, is often empowered by the Legislature to exercise regulative functions. Moreover, it can be safely said that the Executive mostly initiates legislations with the Legislature only to consider and pass them into law upon F complying with the relevant procedural requirements.

[12] However, the partial overlap between functions is confined to the spheres of legislative and executive powers. The notion that the separation of powers applies 'to a certain extent' has a special application where these two G powers are concerned. The justification for such an overlap is to promote efficiency of government (see: Sir Owen Dixon, *The Law and the Constitution* (1935) 51 Law Quarterly Review 590 at p 606). It must be remembered that in a Commonwealth frame of government, the Executive is responsible to Parliament (see: *Victorian Stevedoring & General Contracting Co v Dignan*). H Since the Executive body is at all times subject to the control of the Legislature, the delegation of regulative power by the Legislature to an Executive body does not mean that the Legislature has abdicated a constitutionally vested power (see: *A-G of Commonwealth for Australia v R and Boilermakers' Society of Australia* [1957] AC 288 at p 315).

I

[13] In contrast, questions of judicial power occupy a place apart under the constitution due to its special nature. The absolute independence of the Judiciary is the bulwark of the constitution against encroachment whether by the Legislature or by the Executive (see: *A-G of Commonwealth for Australia v R*

and Boilermakers' Society of Australia at p 315). The importance of judicial power having a distinct and separate existence was underlined by Sir William Blackstone (in *Commentaries on the Laws of England* at pp 259–260) by these words:

> *In this distinct and separate existence of the judicial power ... consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power*. Were [judicial power] joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the Executive, this union might soon be an overbalance for the legislative ... Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. (Emphasis added.)

[14] Quoting the passage from Blackstone above, Deane J in *Re Tracey; ex parte Ryan* (1989) 84 ALR 1 said this:

> Therein lie the main point and justification of the doctrine of the separation of judicial from executive and legislative powers upon which the Constitution is structured. To ignore the significance of the doctrine or to discount the importance of safeguarding the true independence of the judicature upon which the doctrine is predicated is to run the risk of undermining, or even subverting, the Constitution's only general guarantee of due process.

[15] As such, whatever overlap there may be between the exercise of legislative and executive powers the separation between these two powers on the one hand and judicial power on the other is total or effectively so (see: *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 at para [13]). Such separation, based on the rule of law, is a characteristic feature of democracies (see: *Regina (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at para [39]). As aptly described by Harrison Moore (WH Moore, *The Constitution of the Commonwealth of Australia* (2nd Ed, Melbourne: Maxwell, 1910) at p 101) thus:

> Between legislative and executive power on the one hand, and judicial power on the other, there is a great cleavage.

[16] It should also be noted that the principle of separation of powers and the concept of judicial independence have been recognised as sacrosanct, forming part of the basic structure of the FC (see: *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 at para [90]). It is the duty of the courts to protect the constitution from being undermined by the whittling away of the principles upon which it is based. As such, the judicial power of the Federation vested in the Judiciary 'will naturally be the subject of

A our special watchfulness even to the point of jealousy' (see: *Lynham v Butler (No 2)* [1933] IR 74 at p 97).

THE IMPLICATIONS

B **[17]** Based therefore on a proper understanding of the principle of separation of powers, these are some of the basic tenets in relation to judicial powers that must be observed:

(a) first, judicial power cannot be removed from the Judiciary;

C (b) second, judicial power cannot be conferred upon any other body which does not comply with the constitutional safeguards to ensure its independence (see: *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 at paras [51]–[53]); and

D (c) thirdly, non-judicial power cannot be conferred by another branch of government onto the Judiciary. 'No functions but judicial may be reposed in the judicature' (see: *R v Kirby; ex p Boilermakers' Society of Australia* (1956) ALR 163). The Judiciary may not be vested with functions that are not ancillary or incidental to the exercise of judicial power, but foreign to it. Thus, the Executive government cannot be 'amalgamated with the judicature by the conferral of non-ancillary Executive functions upon the courts' (see: *Re Tracey*).

F **[18]** Parliament is also restrained from reposing any other than judicial power upon the courts (see: *Victorian Stevedoring & General Contracting Co v Dignan*. As Taft CJ noted in *JW Hampton, Jr & Co v United States* 276 US 394 (1928) at pp 406–407:

> G It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.

[19] The power of Parliament to make laws with respect to the matters H enumerated in the Federal or Concurrent Lists of the FC must be understood in the context of the constitutional scheme as a whole. The entries in the legislative lists are not to be read as a *carte blanche* for Parliament to make law contrary to the principle of separation of powers or the exclusive vesting of judicial power under art 121. In fact, despite the lists in the FC the scope of the I Parliament conferring legislative powers to the Executive is not without limit (see: *Victorian Stevedoring & General Contracting Co v Dignan*).

[20] In my view it is therefore a fallacy to suggest that the purported 'flexibility' of the separation of powers doctrine allows an 'overlap and

blending' of functions between branches of government, so that each can exercise the powers of another. Such suggestion ignores the fundamental separation of judicial power from legislative and executive power. It would be a complete mockery to the doctrine of separation of powers if Parliament were allowed to delegate legislative power to the Judiciary. In the words of Abdoolcader SCJ in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 at p 319 such act would render the court's lip service to the principle 'no more than a teasing illusion, like a munificent bequest in a pauper's will'.

RULE OF LAW

[21] The exclusive vesting of judicial power in the Judiciary is also inextricably intertwined with the underlying principle of the rule of law. On a basic level, the rule of law requires that the law is capable of fulfilling its function of guiding the behaviour of persons living under it. For persons to be able to be guided by the law, it is essential that principles of law are correctly and authoritatively decided (see: *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at para [16]).

[22] From a broader constitutional standpoint, the rule of law requires that every power must have legal limits. Unfettered discretion is contrary to the rule of law (see: *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at p 148, *Chng Suan Tze v Minister of Home Affairs & Ors and other appeals* [1988] 1 SLR 132 at p 157). It is for the courts to determine whether the limits of power have been exceeded. As Sundaresh Menon (Chief Justice Singapore) explained in *Tan Seet Eng v Attorney-General and another* [2016] 1 SLR 779 matter at para [1]:

> The rule of law is the bedrock on which our society was founded and on which it has thrived. The term, the rule of law, is not one that admits of a fixed or precise definition. However, one of its core ideas is the notion that the power of the State is vested in the various arms of government and that such power is subject to legal limits. But it would be meaningless to speak of power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. Under our system of government, which is based on the Westminster model, that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits.

[23] The role of the Judiciary is intrinsic to our constitutional structure and the modern democratic state. The words of Lord Bingham in *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2005] 3 All ER 169; [2004] UKHL 56 at para [42] are a pertinent reminder:

> It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out at [29], above, that

> Parliament, the Executive and the courts have different functions. *But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.* (Emphasis added.)

[24] As such, the power of the courts is a natural and necessary corollary not just to the separation of powers, but also to the rule of law (see: *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* at para [33]).

APPROACH TO INTERPRETATION

[25] The central question to be determined in this reference is whether judicial power has been impermissibly vested in the SAC by virtue of ss 56 and 57 of the Central Bank of Malaysia Act 2009 ('the CBMA 2009').

[26] The approach to be adopted is to interpret the impugned sections of the CBMA 2009 to discern whether the SAC was intended by Parliament to exercise judicial power. Such an intention may be express or appear from the nature of the functions assigned (see: *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153; [1926] ALR 339). It is immaterial whether the label ascribed to the SAC's function in the CBMA 2009 is one of 'ascertainment' rather than 'determination'. Considering the substance and actual effect of the impugned provisions can only discover the true nature of their function. It is the substance of the provisions that mater, not the form. After all 'Parliament cannot evade a constitutional restriction by a colourable device' (see: *Hinds v The Queen* at p 227).

[27] A similar view was expressed by Griffith CJ in *Waterside Workers Federation v JW Alexander Ltd* (1918) 25 CLR 434:

> It is impossible under the Constitution to confer such functions upon any body other than a court, *nor can the difficulty be avoided by designating a body, which is not in its essential character a court, by that name, or by calling the functions by another name.* In short, any attempt to vest any part of the judicial power of the Commonwealth in any body other than a court is entirely ineffective. (Emphasis added.)

JUDICIAL POWER

[28] Against the background of legal principles aforementioned, I now turn to the unenviable task of considering the meaning and scope of judicial power.

GENERAL PRINCIPLES

[29] Judicial power is not to be delimited in a narrow or pedantic manner. It extends to all incidental and necessary matters necessary to render it effective (see: *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Mellifont v Attorney-General (Queensland)* (1991) 104 ALR 89 at p 94; (1991) 173 CLR 289). In determining whether judicial power is vested in the SAC, the true criterion is not what powers are expressly or by implication excluded from the scope of judicial power, but what powers are expressly or by implication included in it (see: *A-G of Commonwealth for Australia v R and Boilermakers' Society of Australia* at p 319).

[30] Despite many attempts to define judicial power, 'it has never been found possible to frame a definition that is at once exclusive and exhaustive' (see: *R v Davison* (1954) ALR 877; (1954) 90 CLR 353 per Dixon CJ and McTiernan J; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] ALR 449; (1970) 123 CLR 361; *Palmer v Ayres (in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)) and others* (2017) 341 ALR 18; [2017] HCA 5 at para [43]). The amorphous notion of judicial power seems to 'defy or transcend purely abstract conceptual analysis' (see: *Tasmanian Breweries*). It is a concept that may more appropriately be defined 'by way of description rather than of precise formula' (see: *Lynham v Butler (No 2)* [1933] IR 74 at p 99).

[31] In light of these difficulties, one would be wary of purporting to lay down a mandatory checklist of essential features of judicial power. There is no single feature or element that is conclusive of the exercise of judicial power. The 'answer to the question is to be sought by an examination of all their elements or features' (see: *Tasmanian Breweries* per Walsh J) (see also: *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at p 149 per Lord Simonds LC).

[32] Of course, the modern understanding of judicial power as an exclusive area has two important conceptions (see: *Palmer v Ayres (in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)) and others* (2017) 341 ALR 18; [2017] HCA 5 at para [47]). At the centre of that exclusive area lies the core or essential function of quelling controversies of legal rights and obligations by ascertaining facts, applying law, and exercising discretion (see: *Rizeq v Western Australia* (2017) 344 ALR 421 at para [52]). On the fringe of that area lies certain other functions that may not, on their own, be exclusively judicial in character, but are ancillary or incidental to the exercise of judicial power. These two areas will be considered in turn.

A CORE FEATURES OF JUDICIAL POWER

[33] The classic description of judicial power is that of Griffith CJ in *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330:

B > I am of opinion that the words 'judicial power' as used in Section 71 of the Constitution [which vests the judicial power of the Commonwealth in the courts of Australia] mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision
C > (whether subject to appeal or not) is called upon to take action.

[34] The dicta has been generally accepted not as a comprehensive definition, but an accurate statement or description of its 'broad features' (see: *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC
D 134). These features broadly correspond to the three common features of judicial power posited by the second intervener, whose submissions are adopted by the respondent, namely:

(a) the exercise of an adjudicative function;

E (b) finality in resolving the whole dispute; and

(c) the enforceability of its own decision (by the decision-making body).

EXERCISE OF AN ADJUDICATIVE FUNCTION

F

[35] It was argued on behalf of the second intervener that the function of the SAC in issuing a ruling, pursuant to a reference under s 56 of the CBMA 2009, is one of ascertainment of Syariah principles and not adjudication.

G **[36]** The task of adjudication involves determining questions of fact and law, applying the law as determined to the facts, and reaching an outcome that imposes liability or affects rights (see: *Tasmanian Breweries*). *The Commentaries* of Sir William Blackstone (Vol III) published in 1768, explained an exercise of judicial power in these terms:

H > In every court there must be at least three constituent parts, the actor, reus and judex; the actor or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it; and *the judex or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and by its officers to apply*
I > *the remedy.* (Emphasis added.)

[37] One integral part of the adjudication process is the determination of questions of law. 'All questions of law are for the court' (see: *Federal Commissioner of Taxation v Munro* per Isaacs J). A pronouncement on a

question of law arising from a judicial proceeding was held to constitute an exercise of judicial power in *Mellifont v Attorney-General (Queensland)*. In that case, an accused was discharged in the trial court after the prosecution entered a *nolle prosequi*. A question of law arising from a ruling by the trial judge was referred to the Queensland Court of Criminal Appeal (QCCA). The majority in the High Court of Australia held that the proceedings before the QCCA constituted an exercise of judicial power, since the question of law arose from an actual controversy before the court (at p 98):

> True it is that the purpose of seeking and obtaining a review of the trial judge's ruling was to secure a correct statement of the law so that it would be applied correctly in future cases. However, in our view, in the context of the criminal law, that does not stamp the procedure for which s 669 a (2) *provides as something which is academic or hypothetical so as to deny that it is an exercise of judicial power … The fundamental point, as it seems to us, is that* s 669 a (2) enables the Court of Criminal Appeal to correct an error of law at the trial. It is that characteristic of the proceedings that stamps them as an exercise of judicial power and the decision as a judgment or order within the meaning of s 73.

[38] Another aspect of adjudication is this: the subject matter adjudicated upon concerns the rights and liabilities of parties in dispute. The 'essential element is that (the body) should have power by its determination within jurisdiction, to impose liability or affect rights' (see: *R (Wexford County Council) v Local Government Board* [1902] 2 IR 349 at p 373). The determination itself must result in 'the creation of instant liability in specified persons, as distinct from laying down a rule or standard of conduct for the future' (see: *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 per Latham CJ; *Waterside Workers Federation v JW Alexander Ltd* (1918) 25 CLR 434 at p 463). As expressed by Holmes J in *Prentis v Atlantic Coast Line Co* (1908) 211 US 210 at p 226:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.

[39] Where the adjudication does not relate to the rights and obligations of disputing parties, but involves general considerations of policy, it points against the exercise of judicial power. In *Tasmanian Breweries*, the statutory function of the Trade Practices Tribunal is to determine whether a restriction or practice is contrary to the public interest. The Commissioner of Trade Practices sets the Tribunal in motion. The effect of the determination is to render any agreement providing for such a restriction or practice unenforceable for the future. The High Court of Australia (McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ) held that the functions of the Tribunal did not constitute an exercise of judicial power.

[40] The court placed significant weight on the fact that the determination itself does not involve any claim of right. In *Tasmanian Breweries* Kitto J said this:

> None of the powers of the Tribunal, then, involves any adjudication upon a claim of right. This negative consideration, however, does not stand by itself. The effect given by the Act to a determination under s 49 that a restriction or practice is contrary to the public interest is to render unenforceable for the future an agreement under which the restriction is accepted or the practice is provided for (s 51), and to enable the Tribunal to make such orders as it thinks proper for restraining future conduct which falls within certain descriptions (s 52). The determination itself has no operative effect: it constitutes the factum by reference to which the Act operates to alter the law in relation to the particular case.

[41] Further, the determination by the Tribunal on questions of public interest for future guidance 'attracts indefinite considerations of policy that are more appropriate to law-making' (per Windeyer J). Such a determination is far removed from the paradigm case of adjudicating upon the existing rights and liabilities of parties in dispute. It is important to read the following views of Kitto J in this context:

> Thus the work of the Tribunal is work which would be appropriate for the Legislature itself to do if it had the time to consider individual cases. It would be obviously impracticable for the Parliament to apply its own ideas as to what is contrary to the public interest, either by passing a special Act for every individual case or by laying down a definition which in every case would be sure to produce a result satisfactory to it.

[42] Turning therefore to the facts of the present reference, the background to the dispute can be summarised as follows. The respondent granted *Ijarah* facilities to the applicant concerning the leasing of shipping vessels. The respondent obtained summary judgment against the applicant for outstanding amounts due under the facilities. The applicant appealed, alleging that its failure to derive income from the leasing of the vessels was due to the failure of the respondent to carry out the major maintenance works thereon. In this regard, the applicant challenged the Shariah compliance of cl 2.8 of the *Ijarah* facilities, which provides that the parties agree for the costs of major maintenance works to be borne by the customer (the applicant). The Court of Appeal allowed the appeal, and directed the High Court to refer to the SAC the specific question of law, namely whether cl 2.8 is Shariah-compliant.

[43] The SAC delivered a ruling to the effect that negotiations to determine which party should bear the cost of an asset is allowed, as long as it has been agreed by the contracting parties. The effect of the ruling is that cl 2.8 of the *Ijarah* facilities is Shariah-compliant. The parties are bound by the clause and as the customer, the applicant is obliged to bear the cost of the major

maintenance works on the vessels as agreed. The basis of the applicant's appeal against the summary judgment — that the respondent has failed in its obligation to carry out the major maintenance works — becomes unsustainable. The central issue in the case has thus been disposed of by virtue of the SAC ruling. Unlike the Tribunal in the case of *Tasmanian Breweries*, the SAC ruling is not a general pronouncement on policy matters for the future, but a determination affecting the rights and liabilities of the parties in the dispute before the court.

[44] Under s 57 of the CBMA 2009, the ruling is binding on the High Court. It is not open to the High Court to determine the question of law or consider expert evidence on the issue. There is also no question of the High Court applying the SAC ruling to the facts. The specific clause in dispute was referred to the SAC and the SAC had pronounced on its Shariah compliance. In this case, the High Court was unable to reach any other possible outcome on the issue.

[45] In substance therefore, the rights and obligations of the parties in dispute have effectively been determined by virtue of the SAC ruling. This substantive effect is not annulled by the declaration in the SAC's ruling and in the manual issued by Bank Negara Malaysia, that the function of the SAC is merely to state the *Hukum Syarak*. The task of adjudication has been removed from the High Court and assigned to the SAC. On the facts of this case, the function exercised by the SAC undoubtedly exhibits the first feature of judicial power as submitted by the second intervener.

FINALITY IN RESOLVING THE WHOLE DISPUTE

[46] In respect of the second alleged feature of judicial power, the second intervener contended that the ruling of the SAC does not finally resolve the whole dispute between the parties.

[47] However, striking parallels can be drawn between the role of the SAC under ss 56 and 57 of the CBMA 2009 and the role of land assessors under s 40D of the Land Acquisition Act 1960 ('the LAA 1960'). Section 40D empowers the assessors to determine the amount of compensation. The High Court judge is required either to adopt the opinion of the two assessors, or in the event of a difference in opinion between them, elect to concur with one assessor. All decisions as to the amount of compensation are final and non-appealable.

[48] Section 40D was held to be unconstitutional for purporting to vest judicial power in the assessors in the landmark case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*. This court observed that

A the section did not empower the judge to disagree with the assessors or to give them directions or instructions but 'the aggrieved landowner is left without any recourse, as the assessors' decision is final' (at para [109]). The land assessors' final determination on a single issue — the amount of compensation — to the exclusion of the judge was found to be an usurpation of judicial power. Zainun
B Ali FCJ described the residual role of the judge on the issue of compensation in the following words (at paras [51]–[52]):

> Wherefore now stands the judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision.

C

[49] The facts of the present case are, for all relevant purposes, virtually indistinguishable from that of *Semenyih Jaya*. The ruling of the SAC is final as regards the issue of whether the clause is Shariah compliant. It cannot be challenged by the parties with contrary expert evidence, nor reviewed by the
D High Court, nor overturned on appeal. In exercising this function, the SAC is not subject to any check and balance mechanism. Whether the function of the SAC involves judicial power does not depend on the number of additional issues raised by the parties in any particular dispute. In any event, on the facts of the present case, it is not apparent what, if at all, is left of the dispute to be
E resolved by the High Court. Accordingly, the ruling of the SAC also demonstrates the second suggested indicia of judicial power.

POWER TO ENFORCE ITS OWN DECISION

F

[50] It was contended that the giving of a binding and authoritative decision does not itself indicate judicial power. The decision must be enforceable by the decision-making body itself. Since the SAC itself cannot enforce its own ruling, as the argument goes, judicial power still remains with the court for the SAC
G decision must be forwarded to the court.

[51] It is interesting to note that in all of the cases cited to support the proposition that a binding decision does not judicial power make, the decisions in question were binding on the *parties* involved. No authority was produced in
H relation to a decision by a non-judicial body which is binding on the *court*. The cases cited lend little, if any, assistance to the respondent and the second intervener, for such decisions are wholly different in nature from decisions binding on a court.

I **[52]** The second intervener relied heavily on the case of *Rola Co (Australia) Pty Ltd v Commonwealth*, where Latham CJ expressed the following view:

> *The mere giving of the decision is not the action to which the learned Chief Justice referred. If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then, according to the*

definition quoted, all the attributes of judicial power are plainly present. (Emphasis added.)

[53] Once again, it is important to appreciate the context in which the statement was made. In that case, the Women's Employment Board was established by regulation to determine whether a particular work fell within certain categories, whether women could be employed or continue to be employed in that work, and the terms of employment such as the hours and rate of pay. A Committee of Reference reviewed decisions referred from the Board. Pertinently, the determination was a finding of fact binding upon the employer and the women concerned.

[54] The High Court of Australia held that neither the Board nor the Committee exercised judicial power. Latham CJ explained that:

> The decision of an ordinary court that B is bound to pay money to A applies a pre-existing standard of rights and duties not created by the court itself, with the result that there is an immediately enforceable liability of B to pay to A the sum of money in question. The decision of the Women's Employment Board does not create any such liability, nor does the determination of a Committee of Reference create any such liability. In order to impose an immediately enforceable liability upon any employer, for example, to pay wages to a particular female, *it would be necessary for the female or some person on her behalf — see reg 9A — to sue in a court of competent jurisdiction. If such a proceeding succeeded there would then be a liability created by the determination of the court. In such a proceeding the determination of the Committee of Reference would be evidence of the facts to which it related, but that determination would not in itself create liability.* (Emphasis added.)

[55] The SAC ruling in the present case is, however, of a wholly different nature. The ruling is binding not on the parties but on the High Court. It is not merely evidence of Syariah compliance, but a decision from which the High Court cannot depart. Unlike in the case of *Rola*, there is no necessity for the parties to commence any subsequent proceedings in order to enforce the SAC ruling.

[56] The SAC ruling bears a closer resemblance to the Commission's decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1. In that case, the Human Rights and Equal Opportunity Commission conducted an inquiry on a complaint under the Racial Discrimination Act 1975, and determined that the plaintiff should apologise and pay damages to the complainant. The plaintiff challenged the provisions in the statute which required determinations by the Commission to be registered with the Federal Court, and provided that registered determinations would take effect as if they were orders of that court. The High Court of Australia held that the impugned provisions invalidly vested judicial power in the Commission.

[57] It was found that the making of a determination of a complaint did not itself involve the exercise of judicial power by the Commission, for the statute provides that such a determination was not binding or conclusive between any of the parties. However, it was constitutionally impermissible to provide that the determination would take effect as an order of the court. In their joint judgment, Mason CJ, Brennan J and Toohey J stated that (at p 10):

> But s 25zab goes beyond providing the machinery for the enforcement of a determination. It purports to give a registered determination effect 'as if it were an order made by the Federal Court'. A judicial order made by the Federal Court takes effect as an exercise of Commonwealth judicial power, but a determination by the Commission is neither made nor registered in the exercise of judicial power. *An exercise of executive power by the Commission and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination. Thus, s 25zab purports to prescribe what the Constitution does not permit.* (Emphasis added.)

[58] In the present case, the High Court cannot be said to have retained judicial power by reason of SAC merely forwarding its ruling to it. The effect of the SAC ruling will necessarily be reflected in the order of the High Court on which it binds. It means the determination of the SAC on the issue referred to it becomes enforceable forthwith. Following *Brandy* it is impermissible for the decision of a non-judicial body to take effect as an exercise of judicial power.

[59] Based on the foregoing, it is clear that all three proposed indicia of judicial power are present on the facts of the present case, namely, the SAC exercises an adjudicative function, finally resolves the dispute on the issue of Shariah law, and gives a decision which is immediately enforceable. The sting lies in the ruling being binding on the High Court. The function of the SAC in this case thus falls clearly within what may be termed the core area of judicial power.

FUNCTIONS ANCILLARY/INCIDENTAL TO JUDICIAL POWER

[60] Be that as it may and at the risk of repetition, it must be emphasised the three features discussed above are by no means exhaustive, and that none of them is determinative of judicial power. The absence of any particular feature also does not necessarily negate judicial power. The difficulties in delineating the precise boundaries of judicial power arise because many functions are not exclusive to one particular power, but may be ancillary or incidental to legislative, executive, or judicial power depending on its context. One example of a function with a 'double aspect' is the appointment of new trustees. It may be done in the course judicial administration of trusts and assets, or as an administrative act in the exercise of governmental control over public charities

(see: *R v Davison* (1954) ALR 877; (1954) 90 CLR 353).

[61] The functions falling within this penumbral area has been described as 'a borderland in which judicial and administrative functions overlap' (see: *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at p 148). Thus, it was observed in *Boilermakers' Society of Australia* (see also *Queen Victoria Memorial Hospital v Thornton* [1953] 87 CLR 144 at p 151) that:

> ... a function which, considered independently, might seem of its own nature to belong to another division of power yet, in the place it takes in connection with the judicature, falls within the judicial power or what is incidental to it.

[62] As such, while the features outlined above are broadly indicative of the 'paradigm case of judicial power', as alluded earlier on, they are by no means an exhaustive description of all the functions falling within the scope of judicial power. The core features of judicial power above relate to the *nature* or *effect* of a particular function. To determine whether a function is incidental or ancillary to judicial power, one must also consider the *purpose* or *context* of that function.

APPROACH

[63] If a function is consistent with either judicial or other powers, the matter must be examined further:

> It is at that point that the character of the proceeding or of the thing to be done becomes all important. Where the difficulty is to distinguish between a legislative and a judicial proceeding, the end accomplished may be decisive.

(See: *R v Davison*.)

[64] 'The nature of the final act determines the nature of the previous inquiry' (see: *Prentis v Atlantic Coast Line Co* (1908) 211 US 210 per Holmes J). An incidental function takes its dominant character from the main purpose (see: *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153; [1926] ALR 339) or the jurisdiction of which it is a phase (*Tasmanian Breweries*). The test was succinctly put by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *Boilermakers' Society of Australia*:

> What belongs to the judicial power or is incidental or ancillary to it cannot be determined except by ascertaining if it has a sufficient relation to the principal or judicial function or purpose to which it may be thought to be accessory.

A APPLICATION

[65] The facts of *R v Davison* offer an illuminating illustration of this approach. The case concerned the statutory power of a deputy registrar to hear bankruptcy petitions and make sequestration orders. Kitto J noted that while the function of bringing about a bankruptcy could be either a judicial or executive act, in the context of the particular statute, a debtor may only be made a bankrupt by way of a court order upon hearing a petition presented to the court. Consequently, the power was a judicial power and cannot be delegated to a deputy registrar:

> ... while it may be that a provision would be constitutionally valid which enabled a debtor to bring about his own bankruptcy by applying to an executive officer such as a Registrar in Bankruptcy for the performance of some purely administrative act, that proposition does not support the provision which we have here to consider. The Bankruptcy Act provides no way by which a debtor may be made a bankrupt except by means of an order made in the exercise of judicial power upon the hearing of a petition presented to a court. *But it purports to authorize the registrars, the very officials whose office for constitutional reasons has been completely excluded from the organization of the several courts, to come, as it were, into the courts, to take into their own hands proceedings which they find pending upon debtors' petitions presented to those courts, to perform in place of the judges of those courts the function of hearing such petitions, and to dispose of the proceedings by means of orders taking effect, by virtue of s 24(2), as if they were orders of the courts made in exercise of judicial power.* (Emphasis added.)

[66] Another striking example is *Mellifont v Attorney-General (Queensland)*, alluded to earlier, which concerned the referral of a question of law arising from a trial judge's ruling to the Queensland Court of Criminal Appeal (QCCA). The majority in the Australian High Court noted that 'the reference and the decision on the reference arise out of the proceedings on the indictment and are a statutory extension of those proceedings' (at p 98). For this reason, it was held that the decision of the QCCA constituted an exercise of judicial power (at p 97):

> *Such answers are not given in circumstances divorced from an attempt to administer the law as stated by the answers; they are given as an integral part of the process of determining the rights and obligations of the parties which are at stake in the proceedings in which the questions are reserved*. Once this is accepted, as indeed it must be, it follows inevitably that the giving of the answers is an exercise of judicial power because the seeking and the giving of the answers constitutes an important and influential, if not decisive, step in the judicial determination of the rights and liabilities in issue in the litigation. Viewed in this context, it matters not whether the giving of the answers is, as a matter of legal theory, a binding determination, that is, binding on the court at first instance and the parties, as Mason CJ and Dawson J thought (at CLR 245, 302) or influential, that is, binding in a practical sense or virtually so, as Deane, Gaudron and McHugh JJ thought (at CLR 279–80). (Emphasis added.)

[67] These cases can be contrasted with *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 43 ALR 449, which concerned the power of the Trade Practices Commission to require persons to furnish information or produce documents. It was acknowledged that the function of inquiry 'is not necessarily an exercise of judicial power', and 'may be made for executive or legislative purposes', (per Gibbs CJ at p 452). Mason J elaborated that (at p 456):

> *It may constitute an element in the exercise of judicial power when the power is part of the proceedings of the court, its object being to aid the court or the parties to obtain and present evidence in those proceedings.* Then the exercise of the power by the court or the parties in proceedings in the court is for the purpose of enabling the court to hear and determine the lis and is, accordingly, incidental to, if not an element in, the exercise of judicial power. (Emphasis added.)

[68] Interestingly, the learned judge took the view that (at p 457):

> ... once a court begins to exercise the judicial power in relation to a particular matter it has the exclusive right to exercise, or control the exercise of, the functions which form part of that power or are incidental to it.

[69] However, on the facts of the case, Mason J found nothing in the nature of the Commissioner's powers 'to suggest that its sole, substantial or immediate object is to aid the court in its function of hearing and determining cases'. The possibility that inquiries by the Commissioner may yield information to be presented as evidence in court is merely 'consequential and altogether too remote to enable us to say that the power is incidental to the exercise of judicial power' (at p 457).

PURPOSE AND CONTEXT OF THE SAC RULING

[70] The realities of government and the multifarious character of many functions call for a more nuanced and contextual approach to judicial power than an identification of its core features.

[71] Consider the function of ascertaining Islamic law in isolation, divorced from the present facts. Independently, the function may be consistent with judicial or non-judicial power. The true character of the function would depend on the purpose or end to which it is used. For instance, the ascertainment of Islamic law for the purposes of enacting Islamic banking regulations would be an exercise of legislative power. If it is done in for the purpose of approving the activities or transactions of a central bank, it could be regarded as an administrative function.

[72] However, under ss 56 and 57 of the CBMA 2009, the ascertainment of Islamic law by the SAC occurs in the context of an ongoing judicial proceeding

before the High Court. The purpose of such ascertainment is for the SAC to make a ruling on a Shariah matter, which arose from proceedings relating to Islamic financial business, and which is referred to it by the High Court. Because of the ruling is binding upon the High Court the ascertainment becomes an integral and inextricable part of the judicial process of determining the rights and liabilities of the parties in dispute.

[73] Thus, even if (contrary to my finding above) the SAC's function is merely one of ascertainment and does not exhibit any core feature of judicial power, it cannot be regarded otherwise than as ancillary or incidental to the exercise of judicial power. In view of its purpose and context, the issuance of a binding ruling by the SAC undoubtedly falls within the ambit of judicial power.

LEGISLATIVE PURPOSE

[74] The legislative purpose behind the enactment of ss 56 and 57 of the CBMA 2009 is a commendable one. Given its composition, there is no doubt that the members of the SAC would possess the requisite expertise in Shariah law to make rulings on Islamic finance matters. A series of inconsistent court decisions gave rise to concerns over the need for legal certainty in the industry. The method chosen by Parliament to address this concern is to remove from the court and vest in the SAC the power to make decisions on Shariah matters in Islamic finance business (extract from the *Hansard* of 30 June 2009):

> Peranan Majlis Penasihat Syariah Kewangan Islam telah dipertingkatkan di bawah rang undang-undang yang dicadangkan *keputusan yang dibuat oleh Majlis Penasihat Syariah mengikat mahkamah* yang membuat rujukan kepada majlis ini mengenai perkara syariah berkaitan dengan perniagaan kewangan Islam. (Emphasis added.)

[75] However, the good legislative intentions do not excuse a constitutional transgression. The commendable purposes of a legislation cannot be done at the expense of judicial independence and power (see: *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* at para [97]). The Privy Council expressed the point in no weak terms in *Liyanage and other v The Queen* (at p 291):

> If such Acts as these were valid the judicial power could be wholly absorbed by the Legislature and taken out of the hands of the judges. It is appreciated that the Legislature had no such general intention. *It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution.* What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. (Emphasis added.)

[76] The same point was stressed in *Hinds v The Queen*), where the Privy Council held that the vesting of judicial power in the Review Board under the Gun Court Act 1974 was unconstitutional. Lord Diplock explained (at p 226):

> *Whilst none would suggest that a Review Board composed as is provided in section 22 of the Gun Court Act 1974 would not perform its duties responsibly and impartially, the fact remains that the majority of its members are not persons qualified by the Constitution to exercise judicial powers. A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law.* If, consistently with the Constitution, it is permissible for the Parliament to confer the discretion to determine the length of custodial sentences for criminal offences upon a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion upon any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the executive in the whole field of criminal law. (Emphasis added.)

[77] The constitutional invalidity of s 57 of the CBMA 2009, in so far as it vests judicial power in the SAC, is not absolved by the best intentions of Parliament. Moreover, the same legislative purpose can be achieved through other methods that do not involve an infringement of judicial power. For instance, parties to an Islamic finance agreement can agree to submit any questions of Shariah law to the SAC for determination in the event of a dispute, and to be bound by the determinations of the SAC.

[78] The agreement may also include a form of 'conclusive evidence clause', stating that the determination of the SAC is conclusive evidence of the position of Shariah law. In such a case, the court should give effect to the agreement between the parties, and is not at liberty to go behind the determination to question its correctness in the absence of fraud, mala fide, or manifest error (see: *Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo* [2014] 1 MLJ 718 at para [12] in the context of an architect's certificate; *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5 at p 8; *Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad & Ors* [2001] MLJU 125 in the context of a bank's certificate of indebtedness).

CONCLUSION

[79] For the above reasons, I find that s 57 of the CBMA 2009 contravenes art 121 of the FC in so far as it provides that any ruling made by the SAC pursuant to a reference is binding on the High Court making the reference. The effect of the section is to vest judicial power in the SAC to the exclusion of the High Court on Shariah matters. The section must be struck down as unconstitutional and void.

[80] However, it does not follow that striking down s 57 completely obliterates the role of the SAC in all judicial proceedings and leaves the High Court to deal with questions of Shariah law unaided. In *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*, having struck down s 40D of the LAA 1960 and pending its replacement with a new section, this court issued guidance on the process to determine the amount of compensation in land acquisition proceedings. The role of the land assessor was not to be removed but 'redefined'. While the opinion of the assessors no longer binds the court, it was emphasised that weight should be accorded it (at paras [121]–[124]):

> In so doing, it is not uncommon for the judge to give weight to the opinion of the assessors, for as experts in valuation of property, their opinion stand persuasively to be considered by the judge ...
>
> Should the judge finds himself in disagreement with the opinion of both the assessors, he is at liberty to decide the matter, giving his reasons for so doing. These then are to be made clear in place in the proposed new s 40D.
>
> It would in no small way, emphasise the punctilious nature of the assessors' advice and the value their role represents.

[81] Persuasive weight ought to be accorded by the High Court to the ruling of the SAC pursuant to a reference, taking into account its composition, expertise, and special status as the statutory authority for the ascertainment of Islamic law for the purposes of Islamic financial business.

[82] The approach to SAC rulings may be similar to the treatment of muftis' fatwas which have not become law under the respective State Enactments/Ordinances: courts would ordinarily have no reason to justify the rejection of the expert opinion, given that the opinion was expressed by the highest Islamic authority and that judges were not trained in this system of jurisprudence (see: *Re Dato Bentara Luar Decd Haji Yahya bin Yusof & Anor v Hassan bin Othman & Anor* [1982] 2 MLJ 264 (FC) at paras [271]–[272]). In the event that the judge disagrees with a particular ruling, he is at liberty to do so, and reasons should be given.

[83] I would answer the questions 1(b) and (c) in the affirmative. I need not answer question 2(a). Accordingly this matter is remitted to the High Court for further action.

David Wong CJ (Sabah and Sarawak) (delivering dissenting judgment):

INTRODUCTION

[84] This matter came before us by way of reference emanating from the decision of the Court of Appeal on 15 May 2017 which allowed an application

filed by the applicant in the High Court pursuant to art 128(2) of the Federal Constitution and s 84 of the Courts of Judicature Act 1964 to refer questions to the Federal Court in respect of the constitutionality of ss 56 and 57 of the Central Bank of Malaysia Act 2009 ('the CBMA 2009').

[85] The two constitutional questions are as follows:

Question 1

Whether sections 56 and 57 of the Central Bank of Malaysia Act 2009 (CBMA 2009) are unconstitutional and void for:

(a) Contravening Article 74 of the Federal Constitution read together with the Ninth Schedule of the Federal Constitution for the Shariah Advisory Council (SAC) having been vested with the power to ascertain Islamic Law;

(b) Contravening Part IX of the Federal Constitution for the said sections having the effect of vestingjudicial power in the SAC;

(c) Contravening Article 8 of the Federal Constitution for the said sections having the effect of denying a litigant substantive due process.

Question 2

If the above is answered in the negative:

(a) Whether a court nonetheless is entitled to admit and consider expert evidence on any question concerning a Shariah matter relating to Islamic financial business.

BACKGROUND FACTS

[86] The material facts upon which the constitutional questions are posed are these. The applicant in the High Court is the first defendant — JRI Resources Sdn Bhd, whereas the respondent is the plaintiff — Kuwait Finance House (M) Bhd.

[87] Sometime in 2008, the applicant was given by the respondent various Islamic credit facilities ('the facilities'), namely five *Ijarah Muntahiah Bitamlik* facilities ('the Ijarah facilities') and a *Murabahah Tawarruq* Contract Financing facility ('MTQ facility'). The guarantors for the aforesaid facilities were Ismail bin Kamin, Zulhizzan bin Ishak and Norazam bin Ramli who are the second, third and fourth defendants respectively.

[88] The purpose of the facilities was to facilitate the leasing of shipping vessels by the applicant from the respondent which had with its own fund purchased the same at the request of the applicant. As owner of the shipping vessels, they are then leased to the applicant.

[89] The applicant defaulted in making monthly lease payments under the facilities, resulting in the respondent's calling on the guarantors to remedy the applicant's defaults. The guarantors also failed to remedy the obligations of the applicant under the facilities.

[90] To recover the amounts owing under the facilities, the respondent took legal action against the applicant and guarantors on the 2 September 2013.

[91] A summary judgment application was taken by the respondent against the applicant and the guarantors and on 3 October 2014, the High Court granted summary judgment against the applicant and the guarantors in the sum of RM118,261,126.26 as at 8 November 2013 together with compensation fees.

[92] In the summary judgment application proceedings, the applicant had argued that in view of the respondent's failure to carry out the major maintenance works on the shipping vessels, there was a failure to derive income from the charter proceeds (from leasing the shipping vessels). The aforesaid argument was premised on the contention that the carrying out of the major maintenance works on the shipping vessels was the responsibility of the respondent, as owner of the shipping vessels. Such contention is contrary to the express wordings in cl 2.8 of the *Ijarah* agreements which reads as follows:

> Notwithstanding the above clause 2.7, the Parties hereby agree that the *Customer (meaning the Applicant here) shall undertake all of the Major Maintenance* as mentioned herein and the Customer will bear all the costs, charges and expenses in carrying out the same. (Emphasis added.)

[93] Appeals by the applicant and the guarantors were lodged to the Court of Appeal against the summary judgment and on 15 September 2015, counsel for the applicant at the proceeding before the Court of Appeal had submitted that cl 2.8 of the *Ijarah* agreements was not Shariah compliant as the same made it the obligation of the customer (the applicant herein) to bear all the costs of maintaining the shipping vessels (including undertaking major maintenance). The applicant further submitted that the High Court ought to have referred this issue to the Shariah Advisory Council of Bank Negara Malaysia ('the SAC') pursuant to s 56 of the CBMA 2009.

[94] The Court of Appeal after hearing respective submissions from the parties on 15 September 2015 allowed the appeals and set aside the summary judgment. The Court of Appeal further remitted the case to the High Court for trial with a consequent order to the High Court that a reference be made to the SAC on the following question:

> *Whether clause 2.8 of the Ijarah Agreements (which makes it the obligation of the*

Customer, to bear all the costs of maintaining the leased vessels including major maintenance), is Shariah compliant (the Issue).

[95] The Shah Alam High Court in early 2016 referred the aforesaid question to the SAC.

[96] Through a letter dated 30 June 2016 ('the SAC letter'), the SAC made the following reply (English translation as per second intervener's submission):

COURT'S REFERENCE TO BANK NEGARA MALAYSIA'S SHARIAH ADVISORY COUNCIL (CIVIL SUIT NO 22NCVC-584–09/2013)

KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD VS JRI RESOURCES SDN BHD, ISMAIL BIN KAMIN, ZULHIZZAN BIN ISHAK@ MUHAMAD & NORAZAM BIN RAMLI

Introduction:

In answering to the question posed by the Court, the SAC took note that the SAC's duty is merely to analyse the Syariah's issues that are contained in each question posed and to state the Hukum Syarak ruling relating to the question. The SAC does not have jurisdiction to make a finding of facts or to apply the ruling to the facts of the case and to decide whether relating to an issue or for the case because this jurisdiction is vested with the court.

Referred Question:

Whether clause 2.8 in all Ijarah Agreement (4 in total) between the Plaintiff and its customer (the 1st Defendant) is Shariah compliant, in the light of the Shariah Advisory Council resolution made during its 29th meeting on 25.9.2002, the 36th meeting dated 26.6.2003 and the 104th meeting dated 26.8.2010.

Answer:

After referring to the decision of the SAC's earlier meeting, concerning the issue of the cost of maintenance of ijarah's asset, the SAC has decided that in principle, the maintenance cost relating to the ownership of ijarah's asset is the responsibility of the owner, meanwhile the cost relating to the usufruct of the rental is the responsibility of the lessee. Nevertheless, there are few arrangements that were allowed by the SAC which are:

i. The owner of the asset can delegate to the lessee to bear the maintenance cost of the asset and amount of that cost will be fully deducted in the transaction's sale and purchase if the asset at the end of the lease period; or

ii. The owner and the lessee may negotiate and agree to decide which party that will bear the maintenance cost of the asset.

Accordingly, The SAC has decided that the negotiation to determine the party that will beat the maintenance cost if the asset is allowed, as long as it has been agreed by tr contracting parties.

[97] With that SAC letter, the High Court then fixed the matter for trial on 22 August 2016, 29 August 2016 and 30 August2016. However, the applicant filed an application for a reference to the Federal Courts pursuant to art 128(2) of the Federal Constitution and s 84 of the Courts of Judicature Act 1964 before the High Court but was rejected by the learned judge. However, on appeal to the Court of Appeal, the reference was allowed on 15 May 2017, resulting in the High Court on 20 October 2017 making this reference before us.

[98] On 15 March 2018, this court allowed the first and second interveners to intervene in this reference.

THE QUESTIONS

[99] At the start of the hearing of this reference, learned counsel for the applicant informed the court that he would abandon reference question 1(a) as he concedes that Federal Parliament has the legislative competence to enact ss 56 and 57 of the CBMA 2009 ('ss 56 and 57'). That being the case, I now move to reference question 1(b) and (c).

Questions 1(b) and (c)

[100] It is my view that the aforesaid questions are substantially anchored on the determination whether ss 56 and 57 have the legal effect of encroaching on the judicial power of the courts, hence unconstitutional having contravened Part IX of the Federal Constitution — art 121.

[101] The relevant provisions in the CBMA 2009 in this reference are ss 52, 56 and 57 which read as follows:

> 52(1) The Shariah Advisory Council shall have the following functions:
>
> (a) to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part;
>
> (b) to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank;
>
> (c) to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and
>
> (d) Such other functions as may be determined by the Bank.
>
> (2) For the purposed of this Part, 'ruling' means any ruling made by the Shariah Advisory Council for the ascertainment of Islamic law for the purposes of Islamic financial business.

56(1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall —

(a) take into consideration any published rulings of the Shariah Advisory Council; or

(b) refer such question to the Shariah Advisory Council for its ruling.

(2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

57 Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56.

THE APPLICANT'S POSITION

[102] The spplicant's position is quite clear and simply this. Sections 56 and 57 in effect take away the judicial power of the High Court from determining any question concerning a Shariah matter and give it to a non-legal body ('SAC') not provided for under the Federal Constitution. Section 56 requires the High Court to refer any question in relation to Shariah matters to the SAC for a ruling, which ruling under s 57 is binding on the High Court. It is, so to speak, a complete prohibition on the High Court from performing its constitutional function of deliberating and deciding on a dispute before it. To put it simply, the civil courts possess no judicial power to decide on disputes relating to Shariah matters.

[103] Learned counsel for the applicant in supporting his contention relied substantially on this court's decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih'). In that case, there was a similar challenge to the constitutionality of a provision in the Land Acquisition Act 1960 ('the LAA') premised on the judicial power contention as in this case. The impugned provision there was s 40D of the LAA ('s 40D') which reads:

(1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

(2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.

(3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter.

[104] The contention there was that s 40D made it obligatory on the part of the judge to accept the opinion of the two assessors or elect to concur with the decision of either one of them if there are differing opinions between the two assessors in respect of the amount of reasonable compensation arising out of a compulsory acquisition of landed properties. The legislative intent was crystal clear in that the judge cannot be in a position of deciding for himself as to what should be the reasonable compensation amount as he merely anoints the assessors' decision. It was argued then s 40D was unconstitutional as it effectively took away the judge's constitutional function of judging and gave it to two non-judicial personnel to decide.

[105] The above argument was sustained by this court and this was how Zainun bt Ali FCJ (as she then was) rationalised her conclusion:

> [51] Wherefore now stands the judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision.
>
> [52] Section 400 of the Act therefore effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it. This power to decide a matter which is brought before the court is known as judicial power and herein lies the rub. What is judicial power?
>
> ...
>
> [95] However in our view, s 40D of the Act has a wider reach. The implications of the language of s 40D(1) and (2) of the Act is that the assessors in effect take over the judicial power of the court enshrined under art 121(1) of the Federal Constitution in deciding on a reasonable amount of compensation in land reference matters. The judicial power to award compensation has been whittled away from the High Court judge to the assessors in breach of art 121 of the Federal Constitution.

[106] Premised on the above reasoning, learned counsel for the applicant submitted that the judicial power on questions regarding Shariah matter of the High Court had been taken away and had been given to a non-judicial body in the form of SAC. That simply would be unconstitutional as it is a breach of art 121 of the Federal Constitution.

POSITION OF THE RESPONDENT AND INTERVENERS

[107] Learned counsel for the respondent from the outset submitted that SAC was established with only the power to ascertain and rule on Shariah issues and present such ruling to the courts. SAC, it was submitted, makes no determination of the case at hand, that determination is left to the court to apply the SAC ruling to the facts of the case as pleaded by the parties. Reliance was also made to the Manual for References to Shariah Advisory Council by the civil court and arbitrator, issued by the second intervener, in which Part B, para 7 states as follows:

In answering the questions referred by the Court or arbitrator, the Shariah Advisory Council is aware that its role is merely to ascertain the 'hukum Syarak' (Islamic law) in relation to the issues where reference is made. The Shariah Advisory Council does not have any jurisdiction to make any finding of facts or to apply a particular 'hukum' (principle) to the facts of the case or to make a decision whether in relation to an issue or for the case since such jurisdiction is vested with the court and arbitrator.

[108] Reference is also made to the case of *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26; [2011] 4 CLJ 654 where the learned judge there held as follows:

[102] The SAC cannot be said to perform a judicial or quasi-judicial function. The process of ascertainment by the SAC has no attributes of a judicial decision. The necessary attribute of the judicial decision is that it can give a finaljudgment between two parties which carries legal sanction by its own force. It appears to the court that before a person or persons or a body or bodies can be said to exercise judicial powers, he or it must be held that they derive their powers from the State and are exercising the judicial power of the State. An attempt was made to define the words 'Judicial' and 'quasi-judicial' in the case of *Cooper v Wilson & Ors* [1937] 2 KB 309. The relevant quotation reads:

A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) If the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.

[103] The court has no hesitation in holding that the process employed by the SAC is not a judicial process at all. The function of the SAC is confined to the ascertainment of the Islamic law on financial matters.

[104] There is nothing in the Impugned Provisions from which it could be inferred that the SAC really exercising judicial functions. There are no contending parties before the SAC. The issue relating to Islamic financial business is referred to it by the court or arbitrator. The SAC does not require evidence to be taken and witnesses to be examined, cross-examined and re-examined.

[109] The case of *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2012] 7 MLJ 597; [2012] 3 CLJ 249 was also relied on. There the High Court expressed the same sentiments:

A [23] Looking at the purpose of s 56 of Act 707, it is clear that SAC is required to ascertain the applicable Islamic law to the above Shariah Issues. Upon ascertainment of the Islamic Law, the court would then apply it to the facts of the present case. This approach is in consonance with the decision in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor And Other Appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22, where Raus B Sharif JCA (as he then was) stated:

> In this respect, it is our view thatjudges in civil courts should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise ...

C **[110]** Premised on the above, it was submitted that ss 56 and 57 do not vest any judicial power in the SAC.

[111] Learned counsel for the respondent also submitted that the reliance by D the applicant on the *Semenyih* case was misconceived and the reasons are these. In the *Semenyih* case, the two assessors were part of the tribunal in determining the valuation of compensation amount. Further, that tribunal disposed the whole matter in dispute and the disputing parties were before that Tribunal consisting of a judge and two assessors. Of course, here, there are no disputing E parties before the SAC as they are before the court. In *Semenyih* case, the judge in the tribunal did not possess any judicial discretion in that he was precluded from forming an opinion on the appropriate amount of compensation as he had to adopt the valuation of the assessors. As such, learned counsel submitted, *Semenyih* was correct to find that s 40D was unconstitutional and in view of F different factual matrix with the case at hand, it is not applicable here.

[112] Learned counsel for the second intervener in his rebuttal note referred to a journal article by Enid Campbell titled *The Choice between Judicial and Administrative Tribunals and the Separation of Powers* (1987) FLR 12(1)24 and G submits that there must be in existence three essential attributes before one can say a tribunal possesses judicial power and they are:

(a) exercising an adjudicative function;

(b) finality in resolving the whole dispute, and

H (c) enforceability of its decision.

[113] SAC, it was submitted, undoubtedly possesses no such attributes, as such it cannot be said that SAC in making the ruling was exercising any judicial I power.

[114] As for the first intervener, learned counsel in para 21 of his submission submitted as follows:

> 27 ... that the judicial power should have certain characteristic and features, namely:

(a) Exercised in accordance with the judicial process of the judicature — (*Semenyih Jaya Sdn Bhd v Pentabdir Tanah Hulu Langat & anor*)

(b) Is vested only in persons appointed to hold judicial office — (*Semenyih Jaya Sdn Bhd v Pentabdir Tanah Hulu Langat & anor* (supra))

(c) Power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties — (*PP v Dato' Yap Peng*)

(d) Power to determine and arbitrate disputes of a legal nature in which parties are concerned with the protection of their legal interest as opposes to any other interest — (*PP v Dato' Yap Peng*)

(e) Power of a Court to decide and pronounce a Judgment and carry it into effect between persons and parties who bring a case before it before decision — (*PP v Dato' Yap Peng*)

(f) Involve inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined and to observance of the rights and obligations that the application of law to facts has shown to exist — (*Trade Practices Tribunal: Ex Parte Tasmanian Breweries Pty Ltd*).

MY VIEW

[115] Let me start of by looking at the ramification of the judgment in *Semenyih*. As alluded above, this court, through the judgment of Zainun bt Ali FCJ (as she then was) struck down s 40D premised on the ground that it is unconstitutional in that the judicial power of the civil courts have been vested on two non-judicial personnel, hence contravening art 121(1) of the Federal Constitution.

[116] Much have been said as to whether the *Semenyih* judgment in striking down s 40D had relied on the basic structure doctrine which is an Indian judicial principle that the Constitution has certain basic features that cannot be altered or destroyed through amendments by parliament (see *Kesavananda Bharati & Ors v The State of Kerala & Ors* 1973 AIR 1461). Key among these 'basic features' are the fundamental rights granted to individuals by the constitution, the supremacy of the constitution, rule of law and more relevant to the case at hand is the principle of separation of powers and the independence of the Judiciary.

[117] In the *Semenyih* case, s 40D was struck down despite what art 121 of the Constitution says and that is this:

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —

A (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) *(Repealed)*,

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[118] It is quite clear that s 40D is a piece of federal law which does not confer jurisdiction or judicial power on the civil courts to assess the appropriate compensation amount for compulsory land acquisition and yet this court in *Semenyih* saw fit to strike it down, premised on the ground that Parliament does not have the power by legislation to undermine the basic principles of separation of power and the independence of the Judiciary.

[119] Further this court in *Semenyih* had adopted the minority judgment of Richard Malanjum CJ (Sabah and Sarawak) as he then was but the present Chief Justice of the Federal Court, in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341 ('Kok Wah Kuan') where the issue there was whether a provision in the Child Act 2001 contravenes the Constitution. The Chief Justice in no uncertain terms said this of art 121 of the Constitution:

> [37] At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.
>
> [38] The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.
>
> [39] It must be remembered that the courts, especially the Superior Courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the Federal Legislature. In the performance of their function they

perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country ...

[120] There is no doubt in my mind that the then Chief Judge of Sabah and Sarawak in his minority judgment in *Kok Wah Kuan* case had applied the basic structure doctrine and by the very adoption of his opinion, this court in *Semenyih* in my view had also applied the basic structure doctrine in striking down s 40D. One can say *Semenyih* in fact said what others thought it did not say, which is that the basic structure doctrine is very much part of this country's judicial landscape.

[121] Of course, now we have the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 of this court reaffirming the basic structure doctrine, which includes the separation of powers and the independence of the Judiciary.

[122] Zainun bt Ali FCJ (as she then was) found in no uncertain terms that the civil courts have exclusive jurisdiction and inherent jurisdiction to review the actions of a public authority premised on the ground that the powers to review a public authority's actions is a basic part of the Federal Constitution that cannot be altered or removed. This cannot be said of the Shariah courts as they do not have the same power and cannot be given such power as the constitutional safeguards for judicial independence do not apply to them. It was also held by Her Ladyship that the Federal Constitution's basic structure includes judicial powers such as judicial review, the principles of separation of powers, rule of law, and the protection of minorities. Those basic features cannot be removed by amending the Constitution or through federal legislation. Article 121(1) of the Federal Constitution endows judicial power exclusively in the civil courts and such power cannot be given to any other body as they do not have the similar protection as the civil courts to safeguard their independence.

[123] Based on the above, it is thus incumbent on me to apply the basic structure doctrine to determine whether ss 56 and 57 of the CBMA 2009 ought to be struck down.

[124] To recapitulate, the respective learned counsel for the respondent and Interveners had submitted that SAC had not exercised any judicial power in giving its ruling as the disputing parties were not before them. With respect, I cannot accept such contention as it does not take into consideration of the implication of that ruling in the whole scheme of things.

[125] What we have here is an ongoing dispute in the court between the

A applicant and the respondent as to the liability of the applicant under the *Ijarah* agreements and that liability is anchored on cl 28 of the same. As to whether cl 28 is Shariah compliant is the pivotal issue to that liability. The legal implication of the answer to Shariah-compliant issue is simply this. Islamic Banking in this country is regulated under Islamic Financial Services Act 2013
B ('the IFSA') since 30 June 2013. Under this legislation, it is required that persons conducting such business must be licensed and in issuing the license, the Minister must ensure that the licensee's 'aims and operations' would 'in no way contravene the religion of Islam'. Hence any licensed institution under the IFSA must operate its business in a way which would not involve any element
C which is not approved by the Religion of Islam. In short, all financial transactions of the respondent must be Shariah-compliant.

[126] Following that requirement, learned counsel for the applicant contended that if the transaction at hand is founded not to be
D Shariah-compliant, that transaction is tainted with illegality in that it is a transaction forbidden by law. That will then bring into play s 24 of the Contracts Act 1950 which provides that any transaction which is forbidden by law is void.

E **[127]** I come now to the question of what defines judicial power. Let me from outset say that I am in full accord with what is stated by Gageler J in *Palmer v Ayres (in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)) and others* (2017) 341 ALR 18; [2017] HCA 5 and it is this:

F > The difficulty and danger of attempting to formulate some all-encompassing abstract of the judicial power of the Commonwealth was acknowledged from its inception, was repeatedly recognised in judicial pronouncements throughout the twentieth century and has been reiterated in this country

G **[128]** The second intervener posits three essential features of judicial power: adjudication of a dispute, finality in determining the whole dispute, and enforceability of the decision. Given the abstract nature of judicial power, it is doubtful whether the test for the exercise of judicial power can be simplified into a checklist of factors.

H **[129]** Nevertheless, the role of the SAC in the present case can be usefully examined with reference to these factors. The specific question of whether cl 2.8 of the *Ijarah* facilities is Shariah-compliant, which arose in the course of the proceedings before the High Court, was referred to the SAC. The effect of
I the SAC ruling that the said clause is Shariah-compliant is that the parties are bound by the clause, and accordingly the cost for the maintenance works are to be borne by the applicant. The rights and liabilities of the parties in dispute have been adjudicated and finally determined by the SAC. There is no opportunity for the parties to adduce evidence contrary to the SAC ruling, or

to appeal against it. Since the SAC ruling is binding upon the court, it is artificial to contend that the ruling is not itself enforceable by the SAC; the court has no option but to incorporate and apply the substance and effect of the ruling in making the order and delivering the decision.

[130] Thus, upon an analysis of the substance and true effect of the SAC's role in this case, it is clear that the all three elements of adjudication, finality, and enforceability are present. Without purporting to pronounce an exhaustive definition of judicial power, even if one were to apply the test proposed by the second intervener, the role of the SAC under ss 56 and 57 would satisfy all the suggested essential characteristics of judicial power.

[131] According the greatest latitude to the appellant and the interveners, even if the function of the SAC does not exhibit the core characteristics of judicial power, it may arguably be regarded as a 'borderline' case. Borderline functions would form part of the judicial power if they are ancillary or incidental to its exercise. In respect of borderline functions, a contextual approach as used by the High Court of Australia in *R v Davison* (1954) ALR 877; (1954) 90 CLR 353 is to be adopted:

> ... there are many functions or duties that are not necessarily of a judicial character but nay be performed judicially, whether because they are proper subjects of its exercise. How a particular act or thing of this kind is treated by legislation may determine its character. If the Legislature prescribes a judicial process, it may mean that an exercise of the judicial power is indispensable. It is at that point the character of the proceeding or of the thing to be done becomes all important. Where the difficulty is to distinguish between a legislative and a judicial proceeding, the end accomplished may be decisive.

[132] The *Davison* approach reflects the stand taken in the United States where Holmes J in *Prentis v Atlantic Coast Line Co* (1908) 211 US 210 held as follow:

> ... the effect of the inquiry, and of the decision upon it is determined by the nature of the act to which the inquiry and decision lead up ... The nature of the final act determines the nature of the previous inquiry. As the Judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case.

[133] Applying the above approach, I am now duty bound to refer to the context in which ss 56 and 57 are framed and the purpose that the Legislature intended to achieve.

[134] I look at the context in this manner. If there were no ss 56 and 57, the

learned trial judge would have, in the normal course of event, in a trial accepted and taken into consideration of respective and conflicting expert opinions in considering whether cl 28 is Shariah-compliant. His approach in resolving the conflict would be as set out by Edgar Joseph Jr in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 797; [1995] 1 CLJ 15 at p 30:

> When, as here, there was a conflict of expert testimony, the correct approach for the judge to have adopted was not to cut the Gordion knot, as it were, by averaging out the two quantifications aforesaid, but by analysing the reasoning of the rival experts, and then concluding by accepting the version of one over the other.

[135] With the enactment of ss 56 and 57, it is crystal clear that with the SAC's binding ruling, the trial judge's function of analysing the conflicting opinions as is done in every deliberation of a judge in a trial has completely been usurped. There is a complete prohibition on the part of the judge to determine a substantial issue of dispute between the applicant and the respondent as to the legality of cl 28. The SAC's ruling is no more an advice as prior to the enactment of ss 56 and 57, it is now much more. The SAC's ruling for all intents and purposes becomes the ruling of the trial judge. Hence it must be said that the legislative purpose here is to take away from the civil courts the judicial power and place it with SAC on issues relating to Shariah matters.

[136] Hence, with respect, I disagree with the contention that *Semenyih* is distinguishable to the case at hand. In *Semenyih,* the learned judge had no option but to accept the assessment value of the assessors. His judicial power was taken away in no uncertain terms as to what the compensation amount should be. In this case, similarly the judge's judicial power to determine whether cl 28 is Shariah compliant is also taken away by the binding effect of the ruling of SAC. In both instances, the judges have been prohibited from exercising their constitutional duty of judging so to speak. I am fully aware of the fact that in *Semenyih,* the assessors are part of the tribunal of three, of which the judge is a member, deciding the compensation amount. Here though SAC is not part of the court structure, one cannot ignore the two important features and they are firstly that the court is obliged to refer such dispute on Shariah compliance to the SAC for a ruling and secondly that ruling shall bind the court which includes the appellate courts. These two features in effect make the SAC very much part of the judicial framework, though not ostensibly but in my view substantially. SAC, though should be considered as an expert in Islamic law, had by its role of providing a binding ruling on the courts had in no uncertain term stepped into the sphere of judicial function which under the Federal Constitution is solely reserved to the civil courts.

[137] Further I find that there is merit in the contention of the applicant's learned counsel that ss 56 and 57 had scuttled the rights of a litigant to a fair

trial and to due process. These rights involve the right of a litigant to lead expert evidence on matters requiring the same, the right to cross examine the experts on their expertise and the right to make submissions to assist the court to form a binding opinion on the litigants. Here the liability of the applicant is substantially anchored on cl 28 of the *Ijarah* agreements and with the SAC's binding ruling the applicant had been deprived of its right to lead evidence and argue that cl 28 is forbidden by law and hence his liability under the agreement is rendered void. It is not insignificant to note that in *Semenyih,* respective counsel there were given the right to tender expert evidence, cross-examine the experts and make submissions to the court. Despite the aforesaid rights this court held that s 40D to be unconstitutional.

[138] If I may add here, the prohibition of litigants from tendering evidence, be it expert evidence or otherwise, in a civil trial goes against the grain of the very notion of fair play, hence breaching one feature of the concept of 'rule of law'. That feature is no less than the basic right of a litigant to prosecute or defend its case by being able to call witnesses of his or her choice, to cross examine opposing witnesses and then making the relevant submissions before the courts premised on those evidence. That basic right is available to other litigants in cases unrelated to ss 56 and 57 regime. To put it in another way, a litigant would be deprived of afair trial under the regime of ss 56 and 57 and would in effect be discriminated against in that the notion of 'all are equal before the law' as encapsulated in art 8 of the Federal Constitution, has been compromised. The concept of the rule of law underpins the existence of the basic human rights provided for in our Federal Constitution and any legislation which impinges on the aforesaid concept can and should be struck down.

[139] I am also aware of the contention that civil courts may not be well equipped in deciding complex issues of Islamic jurisprudence. This much is made clear by Raus Sharif JCA (as he then was) in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22 where His Lordship said as follows:

> [32] In this respect, it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise. As rightly pointed out by Suriyadi J (as he then was) in *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210; [2006] 8 CLJ 9 that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulamak take years to comprehend *Thus, whether the bank business is in accordance with the Religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamicjurisprudence.*

[140] Similar sentiments are expressed in *Sulaiman bin Takrib v Kerajaan*

Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354; [2009] 2 CLJ 54, where Zaki Tun Azmi PCA (as he then was) said, at para 105:

> This court is not an expert in Islamic law. It therefore has to rely on opinions given by experts in this field.

[141] With respect, that contention ignores the sole reason for the very existence of the civil courts, and it is this. They exist only to adjudicate disputes between parties and make an informed decision only after hearing all relevant evidence including expert opinions and respective submissions. And with it, there is an appeal framework in place to ensure a correct decision is arrived at by the apex court of the land.

[142] Similarly, here respective parties can advance their cases by leading expert evidence, subject the same to cross examination and make their respective submissions before the court makes its decision. It is in my view that this case is no different to many complex medical negligence or construction or intellectual property or trade mark cases handled by various courts daily in the country where experts' evidence from respective sides would be led to allow judges to analyse and then make an informed decision. Judges are trained to analyse evidence led into courts and in complex issues where expert opinions are required, respective counsel will provide such evidence with their respective analysis to assist the court to make an informed decision.

[143] Since the preceding sections relating to the establishment and role of the SAC are not impugned, with the striking down of ss 56 and 57 of the CBMA 2009, proposed new provisions need to be put in place to redefine the role of the SAC in respect of Shariah questions in proceedings relating to Islamic financial business. It is significant that in *Semenyih,* having struck down s 40D as unconstitutional, this court issued guidance on the new procedure to be adopted in proceedings to determine the amount of compensation and the redefined role of the assessors. I would adopt the same approach in this instance.

[144] Where a question concerning a Shariah matter arises in any proceedings relating to Islamic financial business, it is suggested that the court retains the option of referring such question to the SAC for its opinion. In addition to the SAC opinion, parties are free to lead expert evidence in support or contravention of that opinion. The court is to consider the SAC opinion and all the expert evidence adduced in making a determination. In doing so, persuasive weight ought to be given to the opinion of the SAC, taking into account its special role as a 'statutory expert' (as rightly described by Low Hop Bing JCA in *Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd* [2013] 3 MLJ 269). Having evaluated all the evidence, the court is at liberty to disagree with

the SAC opinion, giving reasons for so doing. This procedure 'would in no small way, emphasise the punctilious nature of [the SAC opinion] and the value their role represents' (*Semenyih* at para [124]).

[145] For reasons above, I am constrained to find that ss 56 and 57 had violated the doctrine of separation of power in that the aforesaid sections had clothed SAC, a non-judicial body under the Federal Constitution, with judicial power. For the avoidance of doubt, this decision is to have prospective effect, and is applicable to this case and future cases.

[146] I have given my draft judgment to my learned brothers Chief Justice Richard Malanjum and Justice ldrus to peruse and they have indicated to me that they are agreeable to it and the reasons thereof. I have also read to draft judgment of the Chief Justice and I fully agree with the same.

[147] However, in view of my opinion and reasons thereof and with respect, I am unable to agree with the learned draft judgments of my learned brothers Justice Mohd Zawawi Salleh and Justice Azahar Mohamed.

[148] For reasons as stated above, I answer question 1(b) and (c) in the affirmative. As for question 2(a), there is no necessity to answer in view of my answers to question 1(b) and (c). I make no order as to costs. I also order this matter to be remitted back to the High Court for further action.

Azahar Mohamed FCJ (concurring with majority judgment):

[149] I have read the judgment in draft of my learned brother Justice Mohd Zawawi Salleh. I agree with the opinion expressed on the various issues raised and the conclusion arrived at by His Lordship.

[150] While I agree with my learned brother as regards the conclusion, I would like to express my own views and add the following reasons on the fundamental question of whether ss 56 and 57 of the Central Bank of Malaysia Act 2009 ('the impugned provisions') are in breach of the Federal Constitution and unconstitutional by reason of contravening Part IX of the Federal Constitution for the said sections having the effect of vesting judicial power in the Shariah Advisory Council ('SAC').

[151] In other words, the fundamental constitutional issue raised in this constitutional reference is whether the impugned provisions violates the doctrine of separation of powers, by being an impermissible Parliament intrusion into judicial powers.

[152] As a starting point, it is pertinent to note that as the highest law of the land, the Federal Constitution provides the framework within which the various branches of the government operate. It is premised on the fundamental principle that the Federal Constitution is the ultimate source of all lawful authority in the country. In *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, this court reiterated the fundamental principle that the Federal Constitution is the supreme law of the Malaysian Federation. One of the essential features of the Malaysian Federation is that its institutions and their powers and authorities are regulated by the Federal Constitution (see *Constitutional Federalism in Malaysia* by JC Fong (2nd Ed) at para 3.006).

[153] It bears emphasising, as lucidly stated by Joseph M Fernando in *Federal Constitutions, A Comparative Study of Malaysia and the United States*, at p vii, 'Constitutions are the basic fundamental laws of most modern nations and the highest source of legal authority. Constitutions provide for a pattern of government and define the distribution of powers between the various organs of government and the limits of the government over the governed'. The institutions of government created by the Constitution have to function in accordance with it (see *MP Jain Indian Constitutional Law* (7th Ed) at p 5).

[154] It is also worth emphasising that our Federal Constitution is grounded on the Westminster system of parliamentary government under which the sovereign power of the State is distributed among three branches of government, viz, Legislature, the Executive and the Judiciary (see *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187). Legislature, the Executive and the Judiciary are all co-equal branches of government. This distribution of the governance of the State to the three branches reflects the doctrine of the separation of powers. At the core of the doctrine is the notion that each branch of the government must be separate and independent from each other. As decided by this court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, this important doctrine is critical as it is sacrosanct in our constitutional framework and is part of the basic structure of our Federal Constitution.

[155] It has been said that for one branch of the government usurps the rightful authority and power of another is to undermine doctrine of separation of powers. Having said that, I note at the same time that the doctrine recognises that, where necessary, one branch of the government should be allowed to exercise part of the powers of another branch and the delegation of power by one branch of the government to another. This point is made by Professor Dr Shad Saleem Faruqi in *Document of Destiny, The Constitution of the Federation of Malaysia*, with the necessary emphasis, at p 48:

> *It is wrong to suggest that the powers of the state are neatly divisible into three categories. The truth is that each of the three functions of government contains elements of the other*

two and that any attempt rigidly to define and separate these functions must either fail or cause serious inefficiency in government. For example, if the Ministry of Higher Education, on being satisfied that a candidate meets the criterion, which it has laid down for awards of scholarships, makes a financial grant to the student, then its act is plainly an executive or administrative act. But if the Ministry were to elaborate in detail the conditions under which a student qualifies for a grant, and issues circulars setting out such conditions for information and compliance by all educational institutions, this action would seem to be the formulation of a general rule ie a legislative or quasi-legislative act. The function of the Ministry could be regarded as legislative from one point of view and as administrative from another.

Under the conditions prevailing at this time, it would be highly inconvenient and unworkable to insist on a rigorous separation of powers. *For example, due to a lack of time and expertise, Parliament is not able to frame each and every law which governs the citizen. Quite often, it delegates its legislative power to members of the executive who then frame rules and regulations on its behalf*. Such framing of legislation by an authority other than Parliament, on parliamentary delegation, is called subsidiary or delegated legislation. It is a power unmistakably legislative (because it relates to the making of laws) yet it is exercised by a delegate belonging to either the executive or judicial branch.

Similarly, the courts today have a backlog of cases. If all income tax and industrial disputes were to be heard in the first instance by the ordinary courts of the land, the administration of justice will be even slower than it is today and the system may get choked up. Administrative tribunals like income tax tribunals or labour tribunals are created by Parliament to decide on disputes in their specialized fields. Administrative tribunals are mostly composed of legally trained persons who are not judges of the courts, yet they perform a judicial function. They are, therefore, called quasi-judicial bodies-partly judicial, partly administrative.

Parliamentary democracies require a blending and not a separation of the executive and legislative branches.

[156] In commenting on the version of strict of powers by Montesquieu, Professor Dr Shad Saleem Faruqi in his latest book, *Our Constitution*, published in 2019 explained at p 62, that 'the executive, legislative and judicial functions are overlapping and cannot be separated in a water-tight way. Nor should they be rigidly separated'.

[157] In *Jayantilal Amrit Lal Shodhan v FN Rana And Others* 1964 AIR 648; 1964 SCR (5) 294, the Supreme Court of India had occasion to lay down the constitutional principles that the constitution has not made an absolute or rigid division of functions between the three branches of the government. In this case, the President of India issued on 24 July 1959, a notification under art 258(1) of the constitution entrusting with the consent of the Government of Bombay to the Commissioners of Divisions in the State of Bombay the functions of the Central Government under the Act in relation to the acquisition of land for the purposes of the Union. By the Bombay

Reorganisation Act 11 of 1960, two new states were constituted and the Baroda division was allotted to the State of Gujarat. Purporting to exerciser the powers entrusted by the notification issued by the President on 24 July 1959, the Commissioner of Baroda Division notified under s 4(1) of the Land Acquisition Act 1 of 1894, the appellants' land as being needed for a public purpose, and authorised the Special Land Acquisition Officer, Ahmedabad to perform the functions of the collector under the Act. After considering the objections raised by the appellant to the proposed acquisition, the Special Land Acquisition Officer submitted his report to the Commissioner, who issued the declaration under s 6(1) of the Act. The appellant thereupon moved the High Court of Gujarat under arts 226 and 227 of the Constitution for a writ but his petition was dismissed. The case of the appellant, among other, was that the proceeding under s 5A of the Act being quasi-judicial in character, authority to make a report thereunder could not be delegated by the Commissioner nor could he consider such a report when made. In delivering the judgment of the majority, Shah J had this to say:

> It cannot however be assumed that the legislative functions are exclusively performed by the Legislature, executive functions by the executive and judicial functions by the Judiciary alone. The Constitution has not made an absolute or rigid division of functions between the three agencies of the State. To the Executive, exercise of functions legislative or judicial are often entrusted. For instance power to frame rules, regulations and notifications which are essentially legislative in character is frequently entrusted to the Executive. Similarly judicial authority is also entrusted by legislation to the Executive authority: *Harinagar Sugar Mills Ltd v Shyamsundar*. In the performance of the executive functions, public authorities issue orders which are not far removed from legislation and make decisions affecting the personal and proprietary rights of individuals which are quasi-judicial in character. In addition to these quasi-judicial, and quasi-legislative functions, the Executive has also been empowered by statute to exercise functions which are legislative and judicial in character, and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics. In the complexity of problems which modern governments have to face and the plethora of parliamentary business to which it inevitably leads, it becomes necessary that the Executive should often exercise powers of subordinate legislation: *Halsbury's Laws of England*, Vol 7, Art 409. It is indeed possible to characterize with precision that an agency of the State is executive, legislative or judicial, but it cannot be predicated (1) [1962] 2 SCR 339 that a particular function exercised by any individual agency is necessarily of the character which the agency bears.

[158] It is in this context that I approach the fundamental constitutional question at hand as set out earlier.

[159] Thus, turning now to the question, what is important in the setting of the present constitutional reference is that the constitutional scheme of the Federal Constitution empowers Parliament, the legislative branch of the

government, to make laws with respect to any of the matters enumerated, among others, in the Federal List as set out in the Ninth Schedule. Item 4(k) of the Federal List in the Ninth Schedule expressly empowers Parliament to make laws with respect to:

> 4 Civil and criminal law and procedure and the administration of justice including:
>
> (k) Ascertainment of Islamic law and other personal laws for the purposes of federal law.

[160] It is uncontroverted that item 4(k) of the Federal List, Ninth Schedule of the Federal Constitution vests legislative competence in Parliament to enact laws aimed at ascertaining Islamic law and other personal laws for purposes of Federal law. The legal consequence of the constitutional arrangement is that, the ascertainment of Islamic law for the purposes of federal law has been assigned by the Federal Constitution to a specific branch of government, that is to say, the legislative branch. The words could have no room for doubt as they are expressed in very imperative and conclusive terms. The mandatory wording in the provisions is absolute and does not admit any exceptions or exemption. I emphasise that in so far as our Federal Constitution is concerned, ascertainment of Islamic law for the purposes of Islamic financial business falls under the legislative power and thus, in my opinion, powers and discretion on such matters are neither inherent nor integral to the judicial function.

[161] What then is the legislative mechanism to ascertain the applicable Islamic law in relation to any aspect of Islamic financial business? The Federal Constitution is silent on the methodology to be used to ascertain Islamic law for that purpose. In my opinion, it falls entirely within the powers and discretion Parliament to decide how this should be exercised. One of the important features of our Federal Constitution is that it does not contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the Executive or the Legislature. Lord Diplock speaking for the Privy Council makes this very point in *Hinds v The Queen* [1977] AC 195:

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government [viz, the Legislature, the Executive and the Judiciary]. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the Executive or the Legislature.

[162] Within the framework of the Federal Constitution, Parliament is endowed with plenary powers of legislation. Parliament in its discretion is legally empowered to assign or delegate its power of ascertaining what is the applicable Islamic law in relation any aspect of Islamic financial business to any branch of the government or to any administrative body. Support for this

A approach is to be found in the two decisions of the High Court of Australia that were cited by learned counsel for the respondent.

[163] First, the important case of *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR
B 153; [1926] ALR 339, which concerns a Taxation Board of Review to review the decisions of the Commissioner of Taxation as to the amount of tax payable. The High Court of Australia had recognised that the Australian Parliament was empowered to make laws in respect of taxation by virtue of s 51 of the Australian Constitution. It then went on to state that the Board of Review,
C which was established pursuant to the Income Tax Assessment Act 1922–1925, was merely auxiliary to the Commissioner of Taxation in his administrative functions. Isaacs J in delivering his judgment, with the necessary emphasis, said:

D > The Constitution, it is true, has broadly and, to a certain extent imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. But the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution.
>
E > Partly repeating, for emphasis, some previous observations, I would say that some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. *Other matters may be subject to a no a priori exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government.* Rules of evidence,
F > the determination of the validity of parliamentary elections, or claims to register trademarks would be instances of this class. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances. Deny that proposition, and you seriously affect the recognized working of representative government. Admit it, and
G > the provision now under consideration is fully sustained.

[164] The second High Court of Australia case is equally important. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] ALR 449; (1970) 123 CLR 361, a challenge was mounted as to whether the
H decisions of the Trade Practices Tribunal in determining whether a trade agreement can be examined and adjudicated upon as being an agreement against public policy, is exercising judicial power. In the course of delivering his judgment, Kitto J observed as follows:

I > Thus the work of the Tribunal is work which would be appropriate for the Legislature itself to do if it had the time to consider individual cases. It would be obviously impracticable for the Parliament to apply its own ideas as to what is contrary to the public interest, either by passing a special Act for every individual case or by laying down a definition, which in every case would be sure to produce a result satisfactory to it. There is probably no practicable alternative to setting up an

> authority, which with some but incomplete guidance from the Legislature will apply its own notions concerning the public interest. This course the Trade Practices Act adopts, contenting itself with prescribing the qualifications for membership of the Tribunal, giving a limited measure of guidance, and then relying upon the Executive's choice of members to ensure, so far as assurance is possible, that the notions applied will be such as the Parliament would approve. ... None of the powers of the Tribunal, then, involves any adjudication upon a claim of right.

[165] It can be seen from the foregoing discussion that save in respect of certain matters where one branch of government should not exercise the functions of another, other matters may be capable of assignment by Parliament in its discretion to more than one branch of government or for that matter to any administrative body. In my opinion, the present case does not fall within any of the matters in which one branch of government should not exercise the functions of another. Applying this approach, it falls within the discretion of our Parliament to decide how the ascertainment of Islamic law should be put into effect.

[166] As the legislative branch of the government, Parliament could legislate a body of laws to ascertain what is the Islamic law applicable on any transactional dispute. However in the complexity and variety of problems that Islamic financial business have to face in the present dynamic business environment, such a methodology is highly impracticable and may cause serious inefficiency. Instead, as it turned out, Parliament, as a matter of policy, recognised a need for the establishment of a single point of reference for the purposes of ascertainment of Islamic laws in relation to Islamic financial business. To this end, Parliament in its wisdom has taken steps, as part of its legislative process, in enacting several legislations to establish SAC in order to support and facilitate the operation of Islamic banking in Malaysia. Parliament had passed the requisite legislations, which in effect assigns or delegates its powers to the SAC to ascertain what is the applicable Islamic law for the business.

[167] The objective behind the establishment of the SAC as the ultimate authority for the ascertainment of Islamic law for the purposes of Islamic financial business is to act as the single point of authoritative reference to ensure consistency and certainty in the application of Islamic principles in Islamic financial business.

[168] In the Central Bank of Malaysia's affidavit of 23 April 2018 filed in the present proceedings affirmed by the Assistant Governor, it has been stated that the necessity for a single authority to ascertain Islamic law for the purpose of Islamic financial business arose because of the rapid increase in the number of players in Islamic banking and finance in the country over the years, the rising

A complexities of Islamic finance products and the corresponding increase in disputes. An unsatisfactory feature of the resolution of the disputes before the civil courts previously has been the reliance on various differing sources of Islamic principles.

B **[169]** As submitted by learned counsel for Central Bank of Malaysia ('CBM'), it is an acknowledged fact that diversity of opinion among experts on Islamic legal principles had led to uncertainty in the Islamic banking industry that affected the stability of the Islamic financial system to the detriment of the economy (citing *Malayan Banking Bhd v Ya' kup bin Oje & Anor* [2007] 6 MLJ C 389, *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631, *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22).

D **[170]** In the case of *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2009] 6 MLJ 416; [2010] 4 CLJ 388, Rohana J (now FCJ) explained why Parliament deemed it fit and necessary to designate the SAC to ascertain the acceptable Islamic law:

E > Taking cognisance that there will always be differences in views and opinions on the Syariah, particularly in the area of muamalat, there will inevitably be varied opinions on the same subject ... It must be in contemplation of the differences in these views and opinions in the area of *muamalat* that the Legislature deems it fit and necessary to designate the SAC to ascertain the acceptable Syariah position.

F **[171]** The same point was made by Mohd Salleh Zawawi J (now FCJ) in the case of *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26; [2011] 4 CLJ 654:

G > In the light of the above, to ensure that the development of Islamic financial instruments progresses smoothly and orderly, the establishment of one supervisory authority in a country is very important. This supervisory authority should have the power to regulate a uniformed interpretation of Islamic law within the sphere of Islamic finance and banking in that country and may choose the best opinion in its decision-making process after taking into consideration all of the authorities, H custom of the locality etc.

[172] Among the challenges facing the Islamic financial services industry are the development of financial services and instruments that are Shariah compliant, commercially viable, valid and enforceable, based on the prevailing I governing laws (see *The New Central Bank of Malaysia Act 2009 (Act 701): Enhancing the Integrity and Role of the Shariah Advisory Council (SAC) in Islamic Finance* by Hakimah Yaacob). Consequently, the SAC was established to preclude any uncertainties in the interpretation of Islamic laws with regard to Islamic financial business. The SAC was established pursuant to s 124 of the

(now repealed) Banking and Financial Institutions Act 1989, which was amended vide the Banking and Financial Institutions (Amendment) Act 1996. The amending Act had amended s 124(7) to state as follows:

> (7) For the purposes of this section
>
> (a) there shall be established a Syariah Advisory Council which shall consist of such members, and shall have such functions, powers and duties as may be specified by the Bank to advise the Bank on the Syariah relating to Islamic banking business or Islamic financial business;

[173] It was as a result of all the above that the Central Bank of Malaysia Act 1958 ('the 1958 Act') was then amended to introduce s 16B, which came into force on 1 January 2004. Section 16B of the 1958 Act provided for the SAC to become the authority for the ascertainment of Islamic law for Islamic banking business, takaful business, Islamic financial business, Islamic development financial business or any other business which is based on Shariah principles that are supervised and regulated by CBM.

[174] One important point has to be highlighted: Parliament plainly had complete constitutional powers to enact these impugned provisions (see *Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd* [2013] 3 MLJ 269 and *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; [2009] 2 CLJ 54).

[175] It is relevant to note that Parliament in debating the proposed amendment to incorporate s 16B into the 1958 Act, had the following goals in mind. At the Dewan Rakyat:

> ... memperkemaskan rangka kerja perundangan dan syariah bagi sektor kewangan dan perbankan Islam dan memperluaskan skop aktiviti Bank Negara yang selari dengan kehendak Syariah.
>
> ... kewujudan suatu rangka kerja perundangan yang lebih menyeluruh bagi sektor kewangan dan perbankan Islam adalah amat penting terutamanya dalam memastikan keseragaman pendapat Syariah yang berkaitan system perbankan dan kewangan Islam.

[176] In the context of civil disputes in court relating to Islamic finance, s 16B(8) of the 1958 Act provides:

> (B) Where in any proceedings relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Syariah principles and is supervised and regulated by the Bank before any court or arbitrator any question arises concerning a Syariah matter, the court or the arbitrator, as the case may be, may —

A (a) take into consideration any written directives issued by the Bank pursuant to subsection (7); or

(b) refer such question to the Syariah Advisory Council for its ruling.

B **[177]** Pursuant to s 16B of the 1958 Act, the rulings made by the SAC were of a non-binding nature on the courts. Section 16B(9) of the 1958 Act provides:

(9) Any ruling made by the Syariah Advisory Council pursuant to a reference made under paragraph (8)(b) shall, for the purposes of the proceedings in respect of which C the reference was made —

(a) if the reference was made by a court, be taken into consideration by the court in arriving at its decision; and

(b) if the reference was made by an arbitrator, be binding on the arbitrator, D

[178] Pursuant to the above, the courts were not compelled to make a reference to the SAC with regard to any Islamic and/or Shariah principles nor be compelled to take into consideration the SAC's rulings.

E **[179]** Following the rapid growth of Islamic financial business in Malaysia, the number of disputes in relation to Islamic banking products in the civil courts however rose significantly. However, as s 16B of the 1958 Act was non-compulsory in nature in terms of referring a Shariah issue to the SAC, the F courts took it upon themselves to determine if a facility was Shariah compliant or not. This approach resulted in the wide-ranging, inconsistent decisions with regard to the principles of *Al-Bai' Bithaman Ajil* ('BBA') (see *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2008] 6 MLJ 295, *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249, *Malayan Banking Bhd* G *v Ya' kup bin Oje & Anor* [2007] 6 MLJ 389, *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631).

[180] In the face of this, the question arose during that time as to the H solution to this increasing challenge. Thus, in line with the Parliament's aim and policy of providing certainty and to prevent incoherent and anomalous decisions in Islamic financial cases, ss 56 and 57 of the 2009 Act, were introduced.

I **[181]** As a result, in 2009, the 1958 Act was repealed and replaced by the Central Bank of Malaysia Act 2009 ('the 2009 Act'), which came into force on 25 November 2009. The 2009 Act also introduced the impugned provisions that made the SAC the authority for the ascertainment of Islamic law with regard to Islamic financial business. The SAC was set up by Parliament to

ascertain what is the applicable Islamic law in relation to any aspect of Islamic financial business.

[182] Section 51 of the 2009 Act authorised the establishment of the SAC by CBM. It provides:

> (1) The Bank may establish a Shariah Advisory Council on Islamic Finance which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic financial business.
>
> (2) The Shariah Advisory Council may determine its own procedures.

[183] Section 52 of the 2009 Act further provides for the functions of the SAC:

> (1) The Shariah Advisory Council shall have the following functions:
>
> (a) to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part;
>
> (b) to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank;
>
> (c) to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and
>
> (d) such other functions as may be determined by the Bank.
>
> (2) For the purposes of this Part, 'ruling' means any ruling made by the Shariah Advisory Council for the ascertainment of Islamic law for the purposes of Islamic financial business.

[184] Section 53 sets out the persons who are qualified to be appointed to the SAC. These would be persons who are qualified in the Shariah or who have knowledge or experience in the Shariah and in banking, finance, law or such other related disciplines. Thus the SAC comprises members who are best-suited to ascertain what Shariah law is, as opposed to members of the Judiciary who are not trained and equipped to arrive at a decision concerning Shariah law. This was to ensure that Islamic financial business law strictly adheres to Shariah law.

[185] Pursuant to the impugned provisions, it is now mandatory for the courts to refer to any published rulings of the SAC and in the absence of such rulings, to refer a question to the SAC for a ruling on Shariah matters and such rulings shall be binding on the courts. Section 56 of the 2009 Act, provides:

> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall —

A (a) take into consideration any published rulings of the Shariah Advisory Council; or

(b) refer such question to the Shariah Advisory Council for its ruling.

(2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

B

[186] Along with this, s 57 of the 2009 Act Act further provides that any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under s 55 and the court or arbitrator making a reference under s 56.

C

[187] The 2009 Act thus established the SAC of CBM as the authority and reference point for the ascertainment of Islamic law for the purposes of Islamic banking and financial business. Under the constitutional framework, Parliament has assigned the role of ascertainment Islamic law in resolving Islamic financial disputes in the civil court to both the SAC and the courts. Ascertainment of Islamic law by the SAC and the courts is part of the most recent Parliament's policy and methodology to ascertain Islamic law for the purposes of resolving disputes on this matter. To borrow the words of Chief Justice Chan in the Singapore case of *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947, this 'reflects more the functional efficiency of the constitutional arrangement' of our Federal Constitution. I will delve into this case in the later part of this judgment. For now, it is important to note that under this constitutional arrangement the courts are duty bound to refer Shariah issues arising from Islamic banking and finance to the SAC, but more importantly they are legally obliged to adopt the SAC's ruling to the disputed matters. The key point to note here is that this should be looked at as a proper constitutional mechanism in order to assist the courts in applying the correct Islamic laws to resolve Islamic financial disputes and upholding Shariah compliant on such matters, as permitted by the Federal Constitution. Within the framework of the Federal Constitution, the SAC and the courts have to operate with some level of integration if our Islamic banking and Islamic financial services are to function well. In this context, I think it is pertinent to refer to the remarks made by Lord Reed at the recent 32nd Sultan Azlan Shah Law Lecture, 2018 entitled *Politics and the Judiciary*, where Lord Reed, among others, said:

D

E

F

G

H

> But neither the separation of powers, nor the principle of judicial independence, means that the courts have to be isolated from the other branches of the state. Although the different functions of the state are best performed by different institutions, those institutions have to operate with some degree of integration if society is to function well. This point was well made by Justice Robert Jackson of the United States Supreme Court in the case of *Youngstown Sheet and Tube Co v Sawyer*, where he said:

I

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

[188] The powers of the SAC and the courts to ascertain any Shariah issues that may arise in Islamic banking and financial disputes are for all intent and purposes powers delegated by Parliament to the SAC and the courts. The implication of the Courts deriving their power from a delegated legislative powers was considered in the Singapore High case of *Mohammad Faizal*. An important feature of *Mohammad Faizal* is this that our Federal Court in the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 accorded approval to the decision in *Mohammad Faizal* in determining the scope, nature and the meaning of 'judicial power'.

[189] In *Mohammad Faizal* the accused that had previously been admitted into a Drug Rehabilitation Centre ('the centre') twice, was charged with a drug offence under the Misuse of Drugs Act ('MDA') for the consumption of morphine. The relevant section of the MDA provided that where someone is found guilty of a relevant drug-related offence and had two prior centre admissions this would trigger an enhanced punishment regime. In other words, courts are required to impose a fixed or mandatory minimum punishment. The central constitutional issue raised in this case was whether sentencing power was a judicial or legislative power. Chan CJ noted that it is important to know when executive or legislative powers ends, and where judicial power begins, 'to separate one constitutional power from the other constitutional powers functionally'. Chan CJ noted that all common law courts, including Singapore, assumed that punishing offenders was part of the judicial power, which included passing a sentence and determining the measure of punishment to impose. However, there was little historical or doctrinal support for the proposition that sentencing power was essentially or exclusively a judicial power, even if the long practice of courts exercising discretion in sentencing gave rise to this impression. After considering several authorities, Chan CJ held that it fell within the discretion of the Legislature to decide whether to confer broad sentencing discretion to courts and thus, the judicial discretion to determine sentences for offenders was a 'modern legislative development'. In other words, judicial discretion in relation to sentencing was a power delegated by the Legislature to courts. Historically, sentencing power was 'neither inherent nor integral to the judicial function; it was for Parliament to determine the measure and range of punishments, which involved social policy and value judgments. On the exercising of a function delegated by the legislative branch to the judicial branch, I agree with the following analysis of Chan CJ, with the necessary emphasis:

> Based on *Munro*'s and *Ashworth*'s theses on the sentencing power of the courts, no punishment prescribed by the legislative branch can intrude into the sentencing function of the courts (since that function is itself derived from a delegated legislative power). *In other words, the principle of separation of powers has no application to the sentencing function because, in constitutional theory, it is a function delegated by the legislative branch to the judicial branch*. The sentencing power is not inherent to the judicial power (except, perhaps, where it is ancillary to a particular judicial power, eg, to punish for contempt of court). Instead, the courts' power to punish is derived from legislation. *The fact that judges have exercised the power to sentence offenders for such a long time reflects more the functional efficiency of this constitutional arrangement, rather than the principle of separation of powers.*

[190] Adopting this approach to the present case, I reach the conclusion that ascertainment of Islamic laws for the purposes of Islamic financial business are a function or power delegated by the legislative branch to the judicial branch and the SAC. As such the impugned provisions could not and did not trespass or intrude onto the judicial power; the provisions did not violate the doctrine of separation of powers. The principle of separation of powers did not apply to invalidate any legislative delegation of powers to the SAC and the courts to ascertain Islamic law for the purposes of resolving disputes on Islamic financial matters. This is not stripping the Judiciary of its powers. Neither the Executive nor Legislature ursups or intrudes the sphere of judicial powers.

Mohd Zawawi Salleh FCJ (delivering judgment of the court):

INTRODUCTION

[191] This matter came before this court by way of a constitutional reference by the High Court at Kuala Lumpur pursuant to s 84 of the Courts of Judicature Act 1964 ('Act 91') and art 128(2) of the Federal Constitution ('the FC').

[192] The constitutional questions reserved for determination by this court are as follows:

(1) Whether Sections 56 and 57 of the Central Bank of Malaysia Act 2009 are in breach of the Federal Constitution and unconstitutional by reason of:-

(a) Contravening Article 74 of the Federal Constitution read together with the Ninth Schedule of the Federal Constitution for the Shariah Advisory Council ('SAC') having been vested with the power to ascertain Islamic law;

(b) Contravening Part IX of the Federal Constitution for the said sections having the effect of vesting judicial power in the SAC; or

(c) Contravening Article 8 of the Federal Constitution for the said

sections having the effect of denying a litigant substantive due process.

(2) If the above is answered in the negative:

(a) Whether the Court is nonetheless entitled to accept or consider the expert evidence in respect of any questions concerning a Shariah matter relating to Islamic finance business.'

[193] The questions raised on behalf of the applicant are of great public importance, especially to Islamic banking and finance industry in Malaysia.

THE PARTIES

[194] The applicant, JRI Resources Sdn Bhd, is a company incorporated in Malaysia with its address at No 46-A, Jalan Ara Satu, Taman Rinting, 81750 Masai, Johor Darul Takzim, and was at all material times a customer of the respondent. The applicant is the first defendant in the proceedings before the High Court.

[195] The respondent is a financial institution incorporated in Malaysia and has its registered address at Level 26, Menara Prestige, No 1, Jalan Pinang, 50450 Kuala Lumpur and had granted various Islamic facilities, including an *Ijarah* facility, to the applicant. The respondent is the plaintiff in the proceedings before the High Court.

[196] The first intervener is the President of Persatuan Institusi Perbankan Islam Malaysia ('Association of Islamic Banking Institutions Malaysia' ('AIBIM')), a body stated to have been established in 1996. It was formerly known as the Association of Interest Free Banking Institutions Malaysia with the objective, inter alia, of promoting the establishment of sound Islamic banking systems and practices and also of promoting and representing the interest of members and rendering where possible such advice or assistance as may be deemed necessary and expedient to members. One of the supports provided by AIBIM is through the establishment of a special taskforce committee known as AIBIM-ISRA Shariah Standard Formulation Task Force to assist Bank Negara Malaysia ('BNM') and International Shariah Research Academy for Islamic Finance ('ISRA') in drafting the standards for Shariah contracts.

[197] The second intervener, BNM, was established pursuant to s 3 of the Central Bank of Malaysia Act 1958 ('the 1958 Act'). The 1958 Act was repealed and replaced by the Central Bank of Malaysia Act 2009 ('the 2009 Act'). The principal object of BNM is 'to promote monetary stability and financial stability to the sustainable growth of the Malaysia economy' (see s

5(1) of the 2009 Act). The primary functions of BNM include to regulate and supervise financial institutions which are subject to the laws enforced by BNM (see s 5(2) and (1) of the 2009 Act) and to promote a sound, progressive and inclusive financial system (s 5(2)(f)). Section 5(4) further provides that BNM 'shall have regard to the national interest' in carrying out its functions under the 2009 Act. The Islamic banking industry is included under the purview of BNM as s 27 of the 2009 Act recognises Islamic financial system as part of the Malaysian financial system besides the conventional financial system.

THE FACTUAL BACKGROUND AND ANTECEDENT PROCEEDINGS

[198] The genesis of the dispute giving rise to this reference proceedings can be traced back to four Ijarah Muntahiah Bitamlik facilities ('the Ijarah facilities') and a Murabahah Tawarruq Contract Financing facility ('the MTQ facility') entered between the applicant and the respondent sometime in 2008. The repayment of these facilities was guaranteed by Ismail bin Kamin, Zulhizzan bin Ishak and Norazam bin Ramli ('the guarantors'), the second, third and fourth defendants in the court below.

[199] The Ijarah facilities concerned the leasing of shipping vessels by the respondent to the applicant. The vessels were purchased at the request of the applicant and the respondent funded the purchase and became the owner of the vessels. These vessels were then leased to the applicant.

[200] The respondent's claim is premised on the applicant's failure to make payment of the amount outstanding to the respondent under the facilities granted.

[201] On 2 September 2013, the respondent filed a civil action against the applicant and the guarantors for the recovery of the amounts due under the facilities.

[202] In 2014, the respondent filed an application for summary judgment against the applicant and the guarantors. On 3 October 2014, the High Court granted summary judgment against the applicant and the guarantors for the outstanding amounts due amounting to RM118,261,126.26 as at 8 November 2013 together with compensation fees.

[203] The applicant then appealed to the Court of Appeal against the summary judgment.

[204] At the hearing before the Court of Appeal on 15 September 2015, the applicant submitted that its failure to derive income from the charter proceeds

(from leasing of the vessels) was due to the failure of the respondent to carry out major maintenance works on the vessels. The applicant alleged that the carrying out of the major maintenance works on the vessels was the responsibility of the respondent, as owner of the vessels.

[205] The applicant further submitted that the High Court had erred in not seeking a ruling on a Shariah issue in relation to the Shariah compliance of cl 2.8 of the Ijarah facilities agreements. Clause 2.8 provided that:

> Notwithstanding the above clause 2.7, the parties hereby agree that the *Customer shall undertake all of the Major Maintenance* as mentioned herein and the Customer will bear all the costs, charges and expenses in carrying out the same. (Emphasis added.)

[206] The Court of Appeal allowed the appeal on 16 September 2015 and directed that the following question be referred to the Shariah Advisory Council ('SAC'):

> Whether cl 2.8 of all the *Ijarah* agreements (four in total) between the plaintiff and its customer (the first defendant) is Shariah compliant, in light of the Shariah Advisory Council resolutions made during its 29th meeting on 29 September 2002, the 36th meeting dated 26 June 2003 and the 104th meeting dated 26 August 2010.

[207] Both the applicant and the respondent actively participated in the process before the SAC. The applicant on or about 15 February 2016, submitted an expert opinion to the SAC and the respondent also submitted its expert opinion to the SAC. The opinions were in conflict. The applicant's expert, Dr Azman Mohd Noor, disagreed with the inclusion of cl 2.8 in the *Ijarah* facilities agreements as he was of the view that it did not comply with Islamic law. On the contrary, the respondent's expert, Dr Azman Hasan, took the position that non-compliance was not material and therefore did not invalidate the *Ijarah* facilities.

[208] On 30 June 2016, the SAC forwarded its ruling to the High Court on the Shariah principles that it had ascertained (see Shariah Advisory Council's Ruling dated 30 June 2016 pp 299–301 of AR Vol 2). The English translation of the said ruling is set out below:

> COURT'S REFERENCE TO BANK NEGARA MALAYSIA'S SHARIAH ADVISORY COUNCIL (CIVIL SUIT NO.33 NCVC-584-09/2013)
>
> KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD VS JRI RESOURCES SDN BHD, ISMAIL BIN KAMIN, ZULHIZZAN BIN ISHAK & MUHAMAD NORAZAM BIN RAMLI
>
> Introduction

In answering to the question posed by the court, the SAC took note that the SAC's duty is merely to analyse the Syariah's issues that are contained in each question posed and to state the Hukum Syarak ruling relating to the question. The SAC does not have jurisdiction to make a finding of facts or to apply the ruling to the facts of the case and to decide whether relating to an issue or for the case because this jurisdiction is vested with the court.

Referred Question

Whether clause 2.8 in all Ijarah Agreements (4 in total) between the Plaintiff and its customer (the 1st Defendant) is Shariah compliant, in the light of the Shariah Advisory Council resolution made during its 29th meeting on 25.9.2002, the 36th meeting dated 26.6.2003 and the 104th meeting dated 26.8.2010.

...

Answer

After referring to the decision of the SAC's earlier meeting, concerning the issue of the cost of maintenance of ijarah's asset, the SAC has decided that in principle, the maintenance cost relating to the ownership of ijarah's asset is the responsibility of the owner, meanwhile the cost relating to the usufruct of the rental is the responsibility of the lessee. Nevertheless, there are few arrangements that were allowed by the SAC which are —

i. The owner of the asset can delegate to the lessee to bear the maintenance cost of the asset and amount of that cost will be fully deducted in the transaction's sale and purchase of the asset at the end of the lease period; or

ii. The owner and the lessee may negotiate and agree to decide which party that will bear the maintenance cost of the asset.

Accordingly, the SAC has decided that the negotiation to determine the party that will bear the maintenance cost of the asset is allowed, as long as it has been agreed by the contracting parties.

[209] Following the ruling from the SAC, the High Court scheduled a hearing date in August/September 2016 for the trial to proceed on the respondent's claim against the applicant.

[210] However, before the trial could proceed, the applicant filed an application for a reference to the Federal Court pursuant to art 128(2) of the FC and s 84 of the Courts of Judicature Act 1964 (Act 91) to determine if ss 56 and 57 of the 2009 Act under which the SAC gave its ruling was constitutionally valid. In short, the applicant declined to accept the ruling issued by the SAC.

[211] The High Court, on 22 August 2016, dismissed the applicant's application for a constitutional reference. The applicant then filed an appeal to the Court of Appeal against the said dismissal.

[212] On 15 May 2017, the Court of Appeal allowed the applicant's appeal and ordered the High Court to make the constitutional reference as sought by the applicant.

[213] Accordingly, on 20 October 2017, the High Court made the reference to the Federal Court. Hence, these reference proceedings before us.

[214] On 15 March 2018, this court allowed AIBIM and BNM to intervene and participate in the reference proceedings.

[215] Before we proceed further, we wish to express our appreciation to all counsel concerned for their lucid, thorough and helpful submissions.

THE APPLICANT'S SUBMISSIONS

Reference question 1(a)

[216] At the outset of the hearing of these reference proceedings, learned counsel for the applicant informed the court that he did not wish to pursue question 1(a). The applicant accepted that item 4(k) of List I (Federal List) in the Ninth Schedule to the FC vests legislative competence in Parliament to enact laws aimed at ascertaining Islamic law and other personal laws for purposes of federal law.

[217] In our considered view, learned counsel's concession on this issue was rightly made in law. Article 74 of the FC enjoins the Federal and State Legislatures in enacting legislation to observe the allocation of legislative power over the matters enumerated in the Ninth Schedule under the respective lists. Article 74 of the FC reads:

> 74 Subject matter of federal and State laws
>
> (1) Without prejudice to any power to make laws conferred on it by any other Article, *Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List* (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, *the Legislature of a State may make laws with respect to any of the matters enumerated in the State List* (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List). (Emphasis added.)

[218] In *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23 (CA), Gopal Sri Ram JCA (as he then was) explained the scheme under art 74:

> The Federal Constitution, in order to lend expression to the federal system of government which we practise, has apportioned legislative power between the States

and the Federation. Each legislative arm of Government — the Legislative Assembly in the case of Sarawak and Parliament in the case of the Federation — is authorised by the Federal Constitution to make laws governing those subjects enumerated in the respective Lists appearing in the Ninth Schedule thereto. Constitutional lawyers term this as 'the enumerated powers doctrine'. It refers to the power of a Legislature, whether State or Federal, to make laws upon topics enumerated in a written constitution. Generally speaking, if a particular subject in respect of which a law is enacted is not one of those enumerated in the enabling constitutional provision, the enacted law is ultra vires and therefore void: *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119. Proceedings to have a law invalidated on this ground — that is to say, the lack of legislative jurisdiction — must be brought in accordance with the terms of art 4(4) read with art 128 of the Federal Constitution.

[219] Item 4(k) of List I (Federal List) in the Ninth Schedule permits Parliament to make laws for the ascertainment of Islamic law and other personal laws for the purpose of federal law. Item 4(k) reads:

> 4 Civil and criminal law and procedure and the administration of justice including —
>
> (k) ascertainment of Islamic law and other personal laws for purposes of federal law.

[220] Further, Parliament has the power to enact laws concerning finance (see Item 7 of List I (Federal List) in the Ninth Schedule to the FC). In *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101; [2007] 5 CLJ 253, it was held by this court at p 113 (MLJ); p 274 (CLJ):

> Item 4(k) provides: 'Ascertainment of Islamic Law and other personal laws for purposes of federal law' is a federal matter. A good example is in the area of Islamic banking, Islamic finance and takaful. Banking, finance and insurance are matters enumerated in the federal list items 7 and 8 respectively. *The ascertainment whether a particular product of banking, finance and insurance (or takaful) is Shariah-compliant or not falls within item 4(k) and is a federal matter. For this purpose, Parliament has established the Syariah Advisory Council — see* s 16B of the Central Bank of Malaysia Act 1958 (Act 519). (Emphasis added).

[221] In *Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd* [2013] 3 MLJ 269, the Court of Appeal expressed its view at pp 275–276 in these words:

> [20] We take the view that the constitutionality of ss 56 and 57 is to be tested by reference to the legislative powers of Parliament to enact these sections. Article 74(1) empowers Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1), or the Concurrent List (List 3), of the Ninth Schedule to the Federal Constitution. Item 4(k) of List 1 clearly provides that Parliament is empowered to make laws in respect of:
>
> > 4 Civil and criminal law and procedure and the administration of justice, including —

...

(k) ascertainment of Islamic law and other personal laws for purposes of federal law

[21] Banking is a matter within the Federal List and the Islamic Banking Act 1983 as well as the Central Bank of Malaysia Act 2009 are clearly federal laws. *Thus, ss 56 and 57 are within Parliament's power to enact*. (Emphasis added.)

[222] In our considered view, it is beyond doubt that the FC confers power on Parliament to enact a law in respect of the ascertainment of Islamic banking because financial matters are within item 7 of the Federal List and also because item 4(k) specifically permits Parliament to enact laws aimed at ascertaining Islamic and other personal laws for the purposes of federal law.

[223] That was, however, not the end of the matter. While learned counsel for the applicant conceded that by virtue of item 4(k) of List I (Federal List) in the Ninth to Schedule to the FC, it is within legislative competence of Parliament to enact a law in respect of the ascertainment of Islamic banking, he then in the same breath argued that ss 56 and 57 of the 2009 Act go beyond the scope of item 4(k) of the FC. The contention as made by learned counsel for the applicant in the Court of Appeal was as follows:

It is however submitted that sections 56 and 57, CBMA go beyond the scope of Item 4(k) and as such were enacted unconstitutionally in view of Parliament not having been competent to enact such laws;

In this regard, a distinction is to be drawn between the ascertainment of Islamic law (as provided for under section 52(1)(a), CBMA) and the determination of a question concerning a Shariah matter (as provided for under section 56(1), CBMA).

[224] Learned counsel sought to impress upon us that the law making power of Parliament is bound by the concept of constitutional limitation. Where a law is enacted for purposes not sanctioned by the Constitution, it must be held to be unconstitutional and void. The Constitution is suprema lex, the supreme law of the land (see art 4 of the FC) and there is no organ of government above or beyond it. Every organ of the government, be it the Executive, the Legislature or the Judiciary, derives its authority from the Constitution and it has to act within the limits of the authority. If there is a transgression of the constitutional limitation, the law made by the Legislature has to be declared ultra vires by the court.

[225] We find it convenient to deal with this issue together with question No 1(b) since both issues are clearly related and the arguments presented by learned counsel for the applicant are overlapping and intertwined.

Reference question 1(b)

[226] The issue that forms the axis of the dispute between the parties in this reference proceedings is whether ss 56 and 57 of the 2009 Act are unconstitutional as they contravene Part IX of the FC (Article 121) on the judicial power, and that 'the said sections have the effect of vesting judicial power in the SAC'.

[227] In regard to question 1(b), learned counsel for the applicant in his submission has two strings to his bow. First, learned counsel argued that the doctrines of separation of powers and independence of the Judiciary are basic features of the FC and are an integral part of its basic structure. It is an essential feature of the Judiciary that it be seised with all the powers necessary to comprehensively determine any matters that come before the courts. This is an essential feature of the court and necessarily arises from the language of art 121(1)–(1B) and (2) of the FC. In support of his submission, emphatic reliance was placed on the decision of the celebrated case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('*Semenyih Jaya* case') wherein this court, inter alia, held that the judicial power resides solely in the Judiciary and no other as is explicit in art 121(1) of the FC. In the superior courts, only judges appointed under art 121(1) of the FC, and no other, could exercise decision-making powers. The discharge of judicial power by non-qualified persons (not being judges or judicial officers) or non-judicial personages renders the said exercise ultra vires art 121(1) of the FC.

[228] Another string to his bow is that the power to adjudicate in civil and criminal matters is exclusively vested in the courts. For this purpose, judicial power is to be understood as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties. To that end, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Reliance was placed on the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 wherein the Federal Court, inter alia, held that:

> [51] The significance of the exclusive vesting of judicial power in the Judiciary, and the vital role of judicial review in the basic structure of the constitution, is twofold. First, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party.

[229] The essence of learned counsel's submission is that it is impermissible for the Legislature to abrogate or vest judicial functions, specially the functions traditionally vested in the High Court, and to confer or vest the same in another person or body, which is devoid of essentials of a superior court. In other words, the ascertainment of existing rights by judicial determination of issues of fact or law falls exclusively within judicial power and Parliament cannot confer the function on any other person or body but a court constituted under art 121(1) of the FC. Judicial power requires a court to exercise its independent judgment in interpreting and expounding upon the law. Ascertainment of Islamic law for banking by the SAC would preclude a judge from exercising its independent judgment. It is emphatically the province and duty of the court to say what the law is and no one, not even Parliament, can transfer this power from the Judiciary to another body.

[230] Learned counsel for the applicant then invited our attention to the functions of SAC as stated in s 52 of the 2009 Act:

> 52 Functions of Shariah Advisory Council
>
> (1) The Shariah Advisory Council shall have the following functions:
>
> (a) *to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part;*
>
> (b) to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank;
>
> (c) to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and
>
> (d) such other functions as may be determined by the Bank.
>
> (2) For the purposes of this Part, 'ruling' means any ruling made by the Shariah Advisory Council for the ascertainment of Islamic law for the purposes of Islamic financial business. (Emphasis added.)

[231] Learned counsel posited that reading s 52 together with ss 56 and 57 of the 2009 Act, it is self-evident that the SAC has been given a role in legal proceedings relating to Islamic financial business. Learned counsel vehemently submitted that by virtue of ss 56 and 57 of the 2009 Act, the SAC's role goes beyond the function of ascertaining Islamic law on any question of Shariah that arises in dispute before a High Court.

[232] Whilst canvassing the above contention, learned counsel for the applicant pointed out that in the event a reference is made by a court or arbitrator concerning Shariah question(s), it would require the SAC to determine the appropriate legal principles to be applied to the transaction concerned. This would necessarily involve a consideration of the nature of the transaction and the agreement(s) entered into for that purpose. Other facts

might also be relevant, for instance, the method employed to bind the parties to the transaction for the purpose of the said transaction. The SAC then has to apply the appropriate legal principles to the material facts so as to enable a ruling to be issued on the question(s) referred.

[233] It was the contention of learned counsel that the steps described above are not merely an exercise directed at ascertainment of Islamic law, such as is contemplated by item 4(k), List I (Federal List) in the Ninth Schedule to the FC but in fact an exercise of a judicial function. Moreover, the ruling issued by the SAC is binding on the High Court.

[234] Learned counsel further submitted that the ruling(s) of the SAC is to all intent and purposes an opinion. The courts have characterised the SAC for this purpose as a 'statutory expert', citing observation made by the learned judge in *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26; [2011] 4 CLJ 654, at para 109:

> Hence, the ruling issued by the SAC is an expert opinion in respect of Islamic finance matters and it derives its binding legal effect from the Impugned Provisions enacted pursuant to the jurisdiction provided under the Federal Constitution.

[235] Learned counsel contended that this in itself is not controversial. This court had declared in *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; [2009] 2 CLJ 54 (FC), per Zaki Azmi PCA (as he then was) at para 105:

> This court is not an expert in Islamic law. It therefore has to rely on opinions given by experts in this field.

[236] According to learned counsel, the difficulty created by ss 56 and 57 of the 2009 Act is that these provisions, firstly, remove the discretion of the High Court as to the need for expert evidence on the subject, and secondly, make the 'expert opinion' of the SAC binding. It is settled that it is for the trial court to determine whether to accept expert evidence and, in the face of conflicting opinions, to determine which opinion (if at all) is to be preferred. As Edgar Joseph J said in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15:

> It was submitted by counsel for the purchaser, and we agree, that this was not the correct approach for the judge to have adopted. When, as here, there was a conflict of expert testimony, the correct approach for the judge to have adopted was not to cut the Gordian knot, as it were, by averaging out the two quantifications aforesaid, but by analysing the reasoning of the rival experts, and then concluding by accepting the version of one over the other.

[237] Thus, by compelling the High Court to refer question(s) of Shariah to the SAC and the ruling made is to be binding, these provisions effectively usurp judicial function and power of the court. It precludes the High Court from embarking on a line of enquiry essential to its constitutional role and function. Learned counsel further submitted that the ruling of the SAC should be considered merely as guiding principles upon a court but not binding as provided for by s 16B of the 1958 Act.

[238] Learned counsel concluded his submission by contending that indeed the SAC does exercise judicial power in so far as question(s) of Shariah is concerned. Therefore, ss 56 and 57 contravene art 121(1) of the FC. These sections ought to be declared as unconstitutional and void.

[239] Both facets of the arguments advanced by learned counsel for the applicant had been seriously opposed by learned counsel for the respondent and interveners. We will refer to their submissions in the course of our deliberation.

LEGISLATIVE HISTORY OF THE SAC

[240] Before we dwell on the legal issues raised by learned counsel for the applicant, perhaps it would be useful to narrate the legislative history and genesis of the SAC.

[241] It is necessary to find out what were the concerns of Parliament, based on the legislative history of the SAC, when it introduced the new ss 56 and 57 into the 2009 Act.

[242] The best way to understand a law is to know the reason for it. In *Utkal Contractors and Joinery Pvt Ltd and others v State of Orissa and others* 1987 AIR 1454, Justice Chinnappa Reddy of the Indian Supreme Court, said:

> 9 ... *A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation*. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids.
>
> The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead ... (Emphasis added.)

[243] Again in *Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others* 1987 AIR 1023, Justice Reddy said:

> 33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. *A statute is best interpreted when the object and purpose of its enacted*. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. *If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context*. With these glasses the court must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. (Emphasis added.)

[244] To provide context, we first give an overview of the unique characteristics of Islamic banking. One of the unique characteristics of Islamic banking and finance is compliance with Shariah principles and rulings. Shariah compliance is what distinguishes an Islamic bank from a conventional bank as the former observes certain rules and prohibitions not observed by the latter. Failing to fulfil Shariah compliance requirements would generate a risk called 'the Shariah non-compliance risk'. This risk is unique to the Islamic banking and finance industry, and is particularly significant to it for the following reasons:

(a) it generally impacts the industry's reputation as well as the reputation of the financial institutions and thus, it may deteriorate reliance by depositors, investors, customers and stakeholders in the long term;

(b) contracts containing Shariah repugnant elements which had already been executed are liable to be deemed null and void, which would in turn render the profits derived thereof non-halal. As a result the tainted income arising from such transactions must be channelled to charity and cannot be kept by the bank; and

(c) it may involve some legal costs as potential suits may lead to payment of damages.

[245] Therefore, the existence of non-shariah compliant element would not only affect the confidence of the public in Islamic banking and finance industry, but it might also expose an Islamic bank to losses and fiduciary and reputational risks.

[246] Hence, Shariah compliance is the backbone of Islamic banking and finance industry and Shariah principles are the *raison détre* of all Islamic financial contracts. It gives legitimacy to the practices of Islamic banking and

finance industry and thus validate the profits. It also boosts the confidence of all stakeholders that all the practices and activities of the bank are in compliance with the Shariah. Besides, s 28(i) of the Islamic Financial Services Act 2013 states that one of the duties of an Islamic financial institution is 'to ensure that its aim and operation, business, affairs and activities are in compliance with Shariah'.

[247] However, compliance with Shariah will be confidently achieved only by having a proper Shariah governance framework. This is because Shariah governance is meant to ensure compliance by Islamic banking and finance industry with the rules of Shariah.

[248] In Malaysia, the Shariah governance framework is based on the centralised model compared to a decentralised one being practiced in Gulf Cooperation Council (GCC) countries. The centralised model is formed on the basis that the BNM itself has its own Shariah supervisory board called Shariah Advisory Council (SAC).

(See generally Rusni Hassan, Uzaimah Ibrahim, Nurdiana Irwani Abdullah, Akhtarzaite Abd Aziz and Mohd Fuad Sawari, *An Analysis of the Role and Competency of the Shariah Committees (SCs) of Islamic Banks and Financial Service Providers*, Research Paper (No 18/2010)).

[249] The SAC was established pursuant to s 124 of the (now repealed) Banking and Financial Institutions Act 1989 ('the BAFIA') which was amended vide the Banking and Financial Institutions (Amendment) Act 1996. The amending Act had amended s 124(7) to state as follows:

> (7) For the purposes of this section —
>
> (a) there shall be established a Syariah Advisory Council which shall consist of such members, and shall have such functions, powers and duties as may be specified by the Bank on the Syariah relating to Islamic banking business or Islamic financial business;

[250] The Central Bank of Malaysia Act 1958 ('the 1958 Act') was then amended by the addition of s 16B which came into force on 1 January 2004.

[251] The old s 16B of the 1958 Act expressly stated that where in any proceedings relating to Islamic banking business and Islamic financial business which is based on Shariah principles before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator *may* refer such question to the SAC for its ruling. Any ruling made by the SAC pursuant to a reference by a court, shall be taken into consideration by the court and if the reference was made by an arbitrator, shall be binding on the arbitrator.

[252] Pursuant to the aforesaid provisions, it was not mandatory for the court to refer to the SAC any Islamic and/or Shariah principles. Although the court has to consider the ruling(s), but the court is not bound by such rulings(s). It binds two arbitrators though. However, following the growth of Islamic finance in Malaysia, there was a corresponding rise in disputes in relation to Islamic products in the civil courts.

[253] In the absence of any binding and definitive rulings of the SAC, the learned authors Adnan Trakic and Hanifah Haydar Ali Tajuddin, commented:

> There are instances where different courts have decided differently on the same Islamic banking matters. The asymmetric approaches by the Malaysian judges in deciding Islamic banking and finance issues have widened the uncertainty, and that could adversely affect the future development of Islamic banking and finance industry.

(See Adnan Trakic and Hanifah Haydar Ali Tajudin (eds), *Islamic Banking & Finance: Principles, Instruments & Operations* (p 52) (the Malaysian Current Law Journal 2016.)

[254] In BNM's affidavit of 23 April 2018 filed in the present proceedings affirmed by En Marzunisham bin Omar, Assistant Governor of BNM, it has been clearly stated that there was a necessity for a single authority to ascertain Islamic law for the purpose of Islamic financial business. According to him, because of the rapid increase in the number of players in Islamic banking and finance in the country over the years, the rising complexities of Islamic finance products and the corresponding increase in disputes must be properly managed. An unsatisfactory feature of the resolution of the disputes before the civil courts previously, has been due to the reliance on various differing sources of Islamic principles.

[255] It is an acknowledged fact that diversity of opinion among so-called experts in Islamic legal principles had led to uncertainty in the Islamic banking industry that affected the stability of the Islamic financial system to the detriment of the economy.

[256] In *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67, *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249, *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631, the courts seemed to be reluctant to admit that the issues before the courts involved Shariah disputes and needed to be decided based on reference to the Islamic principles and the ruling of the SAC. The judges disregarded Shariah issues and had dealt with the legal matters purely based on the contractual disputes.

[257] In *Malayan Banking Bhd v Ya' kup bin Oje & Anor* [2007] 6 MLJ 389, it was observed by the High Court at para 28 that it could on its own have recourse to the various sources of Islamic law to determine the appropriate Shariah principle to apply on the 'riba' issue. The court perforce made reference to the judgment of the Supreme Court of Pakistan on the subject and reminded itself of the presence of various forms of legal stratagems called 'helah' to disguise the imposition of interest in Islamic facilities, and other like propositions.

[258] The approaches taken by the courts had also opened the way for Islamic banking cases to be decided based on the civil and common law. In this situation, the underlying transaction, which strictly must comply with the Shariah principles lost its essence. Since Shariah compliance of all business activities is a pivotal requirement in Islamic banking and financial system, it is senseless for the parties to enter into a transaction which is not only governed by civil and common law but also decided even against the Shariah principles.

[259] In *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)*, Abdul Wahab Patail J (as he then was) caused great concern, disquiet and uneasiness among Islamic banks and lawyers when he ruled that the *bai' bithaman ajil* ('BBA') contract in the cases before him was not a bona fide sale but a financing transaction. His Lordship found that the profit portion rendered the transaction contrary to the Islamic Banking Act 1983 on the ground that it made the contract far more onerous than the conventional banking with *riba*. In reaching his decision, His Lordship held that the civil court was not a mere rubber stamp and that its function was to examine the application of the Islamic concepts and to ensure that the transactions did not involve any element not approved in Islam. The learned judge further stated that 'whether the court is a Syariah Court or not, that Allah is omniscient must also be assumed where that court is required, in this case by law, to take cognisance of elements in the religion of Islam'. In emphasising that form could not override substance, even the website of the Bank Negara Malaysia on BBA Financing was not spared his scalpel. The learned judge went so far as to hold the words 'not approved by the religion of Islam' in the Islamic Banking Act 1983 meant that 'unless the financing facility is plainly stated to be offered as specific to a particular mazhab, then the fact it is offered generally to all Muslims means that it must not contain any element not approved by any of the recognised mazhabs'.

[260] On appeal, the aforesaid decision of *Taman Ihsan* was reversed (see in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839 at pp 851 and 853–855; [2009] 6 CLJ 22 at p 34 and 36–39). In doing so, the Court of Appeal held that the BBA facility agreement was valid and enforceable.

[261] The Court of Appeal further held that Islamic financing facilities do not have to satisfy all four *mazhabs* to be considered acceptable in the religion of Islam. On this, the Court of Appeal held at p 853:

> With utmost respect, the learned judge had misinterpreted the meaning of 'do not involve any element which is not approved by the religion of Islam'. First, under s 2 of the Islamic Banking Act 1983, 'Islamic banking business' does not mean banking business whose aims and operations are approved by all the four mazhabs. Secondly, we do not think the religion of Islam is confined to the four mazhabs alone as the sources of Islamic law are not limited to the opinions of the four imams and the schools of jurisprudence named after them. As we all know, Islamic law is derived from the primary sources ie the Holy Quran and the Hadith and secondary sources. There are other secondary sources of Islamic law in addition to the jurisprudence of the four mazhabs.

[262] The Court of Appeal stressed the fact that civil court judges should not decide whether a matter is in accordance with the religion of Islam or not. The Court of Appeal held:

> [32] *In this respect, it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the religion of Islam or otherwise*. As rightly pointed out by Suriyadi J (as he then was) in *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulama' take years to comprehend'. *Thus, whether the bank business is in accordance with the religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence*. (Emphasis added.)

[263] It could be said that the new ss 56 and 57 of the 2009 Act had solved this issue by making it compulsory for the civil court judges to refer the matter to the SAC or to refer to the SAC's ruling.

[264] s 56 of the 2009 Act provides:

> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, *shall*:
>
> (a) take into consideration any published rulings of the Shariah Advisory Council; or
>
> (b) refer such question to the Shariah Advisory Council for its ruling.
>
> (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat. (Emphasis added.)

[265] 'Islamic financial business' is defined in s 2 of the 2009 Act to mean:

any financial business in ringgit or other currency which is subject to the laws enforced by the Bank and consistent with the Shariah.

[266] Section 57 of the 2009 Act further provides:

Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part *shall be binding* on the Islamic financial institutions under section 55 and court or arbitrator making a reference under section 56. (Emphasis added.)

[267] The 2009 Act has enhanced the role and functions of the SAC. The SAC is now the sole authority for the ascertainment of Islamic law for the purpose of Islamic financial business. Although every Islamic financial institution is responsible to form their own Shariah Committee at their institutional level, they are required to observe the advice from the SAC pertaining to Islamic financial businesses. Similarly, when a ruling given by the Shariah committee members constituted in Malaysia by an Islamic financial institution differs from the ruling given by the SAC, the ruling of the SAC shall prevail. This further clears the ambiguity and creates no opportunity for such conflicting ruling/advice to be rendered at all by Shariah Committees.

[268] The 2009 Act further affirms the legal status of Shariah pronouncements issued by the SAC as binding upon both the courts as well as arbitrators. The court or an arbitrator is required to refer to the SAC for deliberation on any Shariah issue as well as take into account its existing Shariah rulings. Undeniably, legal certainty is upheld by the 2009 Act through legal recognition of the SAC as the reference point for courts and arbitrators on any Shariah matter in relation to Islamic finance business. This is crucial to promote consistent implementation of Shariah contractual principles in Islamic financial transactions.

(See generally Tun Abdul Hamid Mohamed and Dr Adnan Trakic, *The Shariah Advisory Council's Role in Resolving Islamic Banking Disputes in Malaysia: A Mode to Follow?* (International Shariah Research Academy for Islamic Finance (ISRA) Research Paper (No 47, 2012)).

[269] In the course of their arguments, learned counsel for the respondent and the interveners attached considerable weight to the need for certainty around the Shariah law applicable to Islamic banking and finance. According to them, uncertainty of Shariah interpretation would be disruptive for the Islamic market to function well. Hence, s 51 of the 2009 Act provides for the establishment of the SAC to serve the particular need for an authoritative view on Shariah matters in Islamic finance.

[270] We agree with the submissions. In this aspect, it is relevant to reproduce the passage in the judgment of Rohana Yusuf J (now FCJ) in *Tan Sri Abdul*

Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2009] 6 MLJ 416; [2010] 4 CLJ 388 at para [18]:

> [18] To my mind there is good reason for having this body. A ruling made by a body given legislative authority will provide certainty, which is a much needed element to ensure business efficacy in a commercial transaction. Taking cognisance that there will always be differences in views and opinions on the Syariah, particularly in the area of *muamalat*, there will inevitably be varied opinions on the same subject. This is mainly due to the permissive nature of the religion of Islam in the area of *muamalat*. Such permissive nature is evidenced in the definition of Islamic Banking Business in s 2 of the Islamic Banking Act 1983 itself. Islamic Banking Business is defined to mean, banking business whose aims and operations do not involve any element which is prohibited by the Religion of Islam. It is amply clear that this definition is premised on the doctrine of 'what is not prohibited will be allowed'. It must be in contemplation of the differences in these views and opinions in the area of *muamalat* that the Legislature deems it fit and necessary to designate the SAC to ascertain the acceptable Syariah position. In fact, it is well accepted that a legitimate and responsible government under the doctrine of siasah as-Syariah is allowed to choose, which amongst the conflicting views is to be adopted as a policy, so long as they do not depart from Quran and Islamic Injunction, for the benefits of the public or the *ummah*. The designation of the SAC is indeed in line with that principle in Islam.

ANALYSIS AND FINDINGS WHETHER SS 56 AND 57 OF THE 2009 ACT GO BEYOND THE SCOPE OF ITEM 4(K) OF LIST 1, FEDERAL LIST OF THE FEDERAL CONSTITUTION

[271] Learned counsel for the second interveners' argument in answer to the submission advanced by learned counsel for the applicant on this issue was simple, clear and, in our judgment, irrefutable. First, he argued that the 'ruling' that is made binding by s 57 is the 'ruling' as defined in s 56(2) which is not for a 'determination' of dispute between the parties but for the 'ascertainment' of the applicable Islamic law 'for the purposes of the Islamic financial business'. Secondly, he asserted that the Legislature deliberately, in consonant with item 4(k) of the Federal List in the Ninth Schedule to the FC, employed the words 'to ascertain' and not 'to determine'.

[272] He then referred us to *Strouds Judicial Dictionary* (9th Ed 2016) where the word 'ascertain' is defined to mean to 'make known' or 'made certain'. In *In re Wait* [1927] 1 Ch 606, Atkin LJ defined the word 'ascertained' as meaning 'identified in accordance with the agreement'. In contrast, the word 'determination' or 'to determine' connotes the end of a process. In *Regina v Young (Trevor)* [2004] 1 WLR 1587, May LJ on behalf of the English Court of Appeal observed with regard to the word 'determination' and 'determining' appearing in a statutory provision, as follows:

> We consider on reflection that the words 'determining' and 'determination' connote the end of the process, that which the court eventually decides.

[273] In *R v Coates* [2004] 1 WLR 3043, the English Court of Appeal observed that a case is 'determined' when the decision is announced and, until then, even if an agreement among the judges is apparent, the case is not determined.

[274] We agree with the submission of learned counsel for the second intervener that the ruling under s 57 of the 2009 Act does not conclude or settle the dispute between the parties arising from the Islamic financing facility at hand. It does not 'determine' the liability of the borrower under the Islamic facility. The determination of a borrower's liability under any banking facility is decided by the presiding judge and not the SAC.

[275] With respect, we are of the view that learned counsel for the applicant overlooked the two points that are central to the impugned provisions as explained above. We are also of the view that it would be a fundamental error to ignore the definition given to particular words by the statute itself, as learned counsel for the applicant seeks to do, or to substitute one word for another. In short, an 'ascertainment' exercise which results in a 'ruling' must not be confused with an act of 'determination' which results in a final decision.

[276] This issue has been settled by the decision of the High Court in *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26; [2011] 4 CLJ 654, wherein the learned judge noted as follows:

> It is the court's considered view that there are differences between these two words ...
>
> Act 701 is a federal law and its contents are consistent to the words employed in the Federal Constitution. In this sense, it can be seen that the SAC is not in a position to issue a new hukm syara' *but to find out which one of the available hukm is the best applicable in Malaysia for the purpose of ascertaining the relevant Islamic laws concerning the question posed to them* ...
>
> *At the end of the matter, the application and final decision of the matter remains with the court*. The court still has to decide the ultimate issues which have been pleaded by the parties. After all, the issue whether the facility is Shariah compliant or not is only one of the issues to be decided by the court. (Emphasis added.)

[277] The above decision was fully endorsed and affirmed by the Court of Appeal in *Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd* [2013] 3 MLJ 269. Low Hop Bing JCA, in delivering the judgment of the Court of Appeal held:

> ... Next, the statutory duty and function of the SAC is to ascertain Islamic financial

matters or business only. *It does not hear evidence nor decide case*.

Sections 56 and 57 contain clear and unambiguous provisions to the effect that whenever there is any Shariah question arising in any proceedings relating to the Islamic financial business before eg any court, it is mandatory to invoke s 56 and refer it to the SAC, a statutory expert, for a ruling. *The duty of the SAC is confined exclusively to the ascertainment of the Islamic law on financial matters or business*. The judicial function is within the domain of the court ie to decide on the issues which the parties have pleaded. (Emphasis added.)

[278] The words we have emphasised in the two cases above are imperative.

[279] For the foregoing reasons, we would answer question No 1(a) in the negative.

REFERENCE QUESTION NO 1(b)

The first contention

[280] To recapitulate, learned counsel for the applicant submitted that it is impermissible for the Legislature to divest the core judicial functions traditionally vested with the High Court and to confer or vest the same in the SAC which lacks the basic characteristics of a superior court, like the High Court. Therefore, ss 56 and 57 of the 2009 Act impugned the doctrine of separation of powers.

The second contention

[281] The gist of the second contention is that by virtue of ss 56 and 57 of the 2009 Act, the SAC has been vested with judicial functions and has been given a role in legal proceedings relating to Islamic finance business. By virtue of s 57 of 2009 Act, the High Court would be bound by the ruling. The High Court as such does not play any role in the ascertaining of the Islamic law or its application to the facts before it to the extent that falls within the scope of the SAC's functions.

[282] For the reasons given below, we are unable to agree with the submissions of learned counsel for the applicant.

Doctrine of separation of powers

[283] The doctrine of separation of powers had been treated by scores of writers and discussed by many judicial decisions in Malaysia and various Commonwealth jurisdictions. We do not need and do not propose to add to

the jurisprudence. For the purpose of this judgment, suffice if we highlight the salient features of the doctrine of separation of powers.

[284] The separation of powers doctrine is not expressly provided in the FC. Yet, the doctrine is recognised as an integral element of our constitutional design (see *Semenyih Jaya* case). The basic contour of the separation of powers is easily stated. It recognises the functional independence of the three branches of government — the Legislature, Judiciary and Executive. The difference between the three branches of the government undoubtedly is that the Legislature makes the law, the Executive executes and enforces the law and the Judiciary interprets the law.

[285] The above statement, whilst accurate and straightforward, is deceptively simple because separation of powers of government has never existed in pure form except in political theory. In reality, there is an overlap and blending of functions, resulting in complementary activity by the different branches that makes absolute separation of powers impossible.

[286] In Malaysia, the Executive and Legislature are closely entwined. The Prime Minister and a majority of his ministers are Members of Parliament and sit in the Dewan Rakyat (House of the Representatives) and Dewan Negara (Senate). The Executive is, therefore, present at the heart of Parliament.

[287] In the case of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 (1) SACR 308 (SCA), the Constitutional Court of South Africa observed at para [13]:

> [13] In seeking to answer the question under consideration, it must be recalled that —
>
> (a) there is no universal model of separation of powers and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.
>
> (b) because of the different systems of checks and balances that exist in countries such as the United States of America, France, the Netherlands and Germany, for example, the relationship between the different branches of government and the power or influence that one branch of government has over the others differs from one country to another.
>
> (c) the separation of powers doctrine is not fixed or rigid constitutional doctrine but it is given expression in many different forms and made subject to checks and balances of many kinds;
>
> (d) our Constitution does not provide for a total separation of powers among the Legislature, the Executive and the Judiciary; and

(e) although judicial officers may, from time to time, carry out administrative tasks '[t]here may be circumstances in which the performance of administrative functions by judicial officers infringers the doctrine of separation of powers'.

[288] In the case of *Botswana Railways' Organization v Setsogo* 1996 BLR 763, the court commented on the doctrine of separation of powers in the context of the Constitution of Botswana in the following terms:

> But the Constitution did not establish that theory in this country in its rigid form. None of the various arms of government: the Executive, the Legislature and the Judiciary comes to life or lives in a hermetically sealed enclave.

[289] It is, therefore, clear that the doctrine of separation of powers is not rigid, fixed or static but continues to evolve. The traditional notion that there are separate and distinct roles for the executive, legislative, and judicial branches of government which should remain inviolate has changed over time to reflect their growing interrelationship to facilitate the efficient operation of government.

[290] In Malaysia today there are several statutory adjudicatory bodies that have decision-making powers in disputes between parties like the Special Commissioners of Income Tax or the Labour Tribunals under the Employment Act 1955, the Industrial Court established under s 21 of the Industrial Relations Act 1967, the Customs Appeal Tribunal (CAT) established under the Customs Act 1967 or the Competition Appeal Tribunal established under s 44 of the Competition Act 2010. They are adorned with similar trappings as a court but are not strictly 'courts' within the meaning of art 121 of the FC.

[291] In *Shell Company of Australia, Limited v Federal Commissioner of Taxation* [1931] AC 275, cited by learned counsel for the second intervener in his argument, a similar point was considered by the Privy Council on the issue whether the Board of Review of Taxation in Australia was a body exercising judicial power of the state. The Privy Council observed thus:

> The authorities are clear to show that there are tribunals with many of the trappings of a court which, nevertheless, are not courts in the strict sense of exercising judicial power.

[292] The Privy Council further focused on certain characteristic features of a court: a tribunal will not become a court merely because it gives a final decision, examines witnesses on oath, contending party is heard, decisions affecting rights of subjects are rendered by it, or decision is appealable to ordinary courts. Even whilst acting judicially, a tribunal may retain its characteristics as an administrative body as distinguished from a court. Applying the aforesaid tests,

the Privy Council ruled that the board of review established under the Income Tax Act 1922–25 of Australia was not a court but only an administrative tribunal empowered by law to review decisions of the Commissioner of Income Tax who was not a judicial authority. The Privy Council goes on to say 'an administrative tribunal may act judicially but still remain an administrative tribunal as distinguished from a court, strictly so called. Mere externals do not make a direction ... by an ad hoc tribunal an exercise by a court of judicial power' (at p 508) (see also *Associated Cement Companies Ltd v PN Sharma And Another* 1965 AIR 1595; *Durga Shankar Mehta v Thakur Raghuraj Singh And Others* 1954 AIR 520; *Kihoto Hollohan v Zachillhu and others* AIR 1993 SC 412; *Virindar Kumar Satyawadi v The State of Punjab* AIR 1956 SC 153; *State of Gujarat Revenue Tribunal Bar Association* 2012 10 SCC 353).

JUDICIAL POWER

[293] The phrase 'judicial power' is difficult to define. In *R v Davison* [1954] ALR 877; (1954) 90 CLR 353, Dixon CT and Mc Tiernan J observed 'many attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive'. Rather than attempt to define phrase 'judicial power', it is more appropriate to examine its characteristics or attributes.

[294] A perusal of the Australian decisions in *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185, *R v Davison* (1954) ALR 877; (1954) 90 CLR 353, *Palmer v Ayres (in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)) and others* (2017) 341 ALR 18; [2017] HCA 5, cited by learned counsel for the respondent in her argument reveal common, though not exclusive, characteristics of judicial power:

(a) exercising adjudicative functions;

(b) finality in resolving the whole dispute; and

(c) enforceability of its own decision.

[295] In the case of *The Bharat Bank Ltd, Dehli v Employees of the Bharat Bank* 1950 AIR 188, the Indian Supreme Court considered whether an Industrial Tribunal was a court. It said that one cannot go by mere nomenclature. One has to examine the functions of a tribunal and how it proceeds to discharge those functions. It held that an Industrial Tribunal had all the trappings of a court and performed functions which cannot but be regarded as judicial. The court referred to the Rules by which proceedings before the Tribunal were regulated. The court dwelt on the fact that the powers vested in it are similar to those exercised by civil courts under the Code of Civil Procedure when trying a suit. It had the power of ordering discovery, inspection

A etc and forcing the attendance of witnesses, compelling production of documents and so on. It gave its decision on the basis of evidence and in accordance with law. Applying the test laid down in the case of *Cooper v Wilson and others* [1937] 2 KB 309 at p 340, the court said that *'a true judicial decision presupposes an existence of dispute between two or more parties and the involves four* B *requisite — (1) the presentation of their case by the parties; (2) ascertainment of facts by means of evidence adduced by the parties often with the assistance of argument; (3) if the dispute relates to a question of law, submission of legal arguments by the parties, and (4) by decision which disposes of the whole mater by findings on fact and application of law to facts so found. Judged by the same tests, a* C *Labour Court would undoubtedly be a court in the true sense of the term*. The question, however, is whether such a court and the presiding officer of such a court can be said to hold a post in the judicial service of the State as defined in Article 36 of the Constitution'. (Emphasis added.)

D **[296]** Learned counsel for the first intervener submitted that similar definition has been adopted in Malaysia in case of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] CLJ Rep 284. It was further expounded in *Semenyih Jaya* case. This court highlighted in the latter case that the exercise of judicial power carries two features. The first feature is that judicial power is E exercised in accordance with the judicial process of the judicature which is also illustrated by Gaudron J in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at p 562 when he said:

> For the moment, it is sufficient to note that the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on F public confidence in the courts in which that power is vested. And public confidence depends on two things. *It depends on the courts acting in accordance with the judicial process*. More precisely, it depends on their acting openly, *impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as* G *they are*. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process.
>
> So critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus, judicial power is not simply a power to settle justiciable controversies, but a power *which must be and must be seen to be exercised* H *in accordance with the judicial process*. (Emphasis added.)

[297] The second feature of judicial power as explained by Her Ladyship Zainun Ali FCJ is vested only in persons appointed to hold judicial office. Therefore, a non-judicial personage has no right to exercise judicial power. As I observed by Lord Diplock in *Hinds v The Queen* [1977] AC 195:

> What, however is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to *continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the*

judicature, even though this is not expressly stated in the Constitution. (Emphasis added.)

[298] We have no reservations in accepting the proposition of law expounded in the *Semenyih Jaya* case. In our considered opinion, the SAC does not have any characteristics of judicial power as laid down in the *Semenyih Jaya* case. The ruling made by the SAC is solely confined to the Shariah issue. The presiding judge who made reference to the SAC will then exercise his judicial power and decide the case based on the evidence submitted before the court. Since there is no judicial power vested in the SAC, the SAC does not usurp the judicial power of the court.

[299] We accept the contention advanced by learned counsel for the first intervener that s 56(1) of the 2009 Act gives option to the court or arbitrator whether to take into consideration the published ruling of the SAC or refer the Shariah issue to the SAC for ruling. The word 'or' in that section signifies that such option is provided to the court or arbitrator. The phrase 'take into consideration' in that section implies that only the court or arbitrator has the exclusive judicial power to decide on the case by applying the ruling of the SAC to the facts of the case before them.

[300] Learned counsel for the applicant submitted, citing the Australian case of *Mellifont v Attorney-General (Queensland)* (1991) 104 ALR 89; (1991) 173 CLR 289, that in order to determine whether a power concerned was judicial power; it was important to consider whether the exercise of such power is 'an integral part of the process of determining the rights and obligations of the parties which are at stake in the proceedings'.

[301] With respect, the submission is without substance for the simple reason that the High Court of Australia in *Mellifont* had recognised that it is the combination of attributes that make an exercise of judicial power. It should also be noted that *Mellifont* is a criminal case and any matter relating to criminal liability vests exclusively with court. Likewise, the case of *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] 4 All ER 1089; [2002] UKHL 46 referred to by learned counsel for the applicant, concerns a dispute in a criminal case, where the court recognised that jurisdiction over disputes in criminal matters lie only with the court.

[302] The Australian High Court itself recognises in the judgment that it is the combination of the attributes that makes it the exercise of judicial power and not any single one or other of them. At p 106 of the law report the following observation is made:

Leaving aside these incidental powers with an administrative ingredient, an essential characteristic of judicial power is that its exercise affect the legal rights, status or

A obligations of persons who are subject to the jurisdiction of the court or body in which the power is reposed. That characteristic is not sufficient by itself to stamp a power as judicial but it is an indispensable characteristic of all powers which are judicial.

B **[303]** We agree with the submission of learned counsel for the respondent that the exercise of judicial power does not exist merely because there is an adjudication of an issue. The reasoning in the following cases support our conclusion:

C (a) in the High Court of Australia's decision of *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] ALR 449; (1970) 123 CLR 361, the issue was whether the Trade Practices Tribunal, in determining whether a trade agreement can be examined and adjudicated upon as being an agreement against public policy, is exercising judicial power. The majority judges decided:

D (i) an adjudication or determination by the Tribunal was not an exercise of judicial power (see pp 371, 375, 376, 378); and

(ii) following from such adjudication, the exercise of a judicial power would involve the application of the law to the facts as determined and an order made to resolve the controversy/dispute (pp 374–375, 394–395, 409, 411);

E (b) this was also the view of the majority judges of the High Court of Australia in *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153; [1926] ALR 339, where the High Court held that judicial power must include jurisdiction to enforce a decision (see pp 176, 200 and 201);

F (c) the Australian High Court in *Rola Co (Australia Pty Ltd* had to consider whether a Women's Employment Board, in having powers to decide on disputes concerning women's classes of work and pay, was exercising judicial power. The court held that so long as a body merely makes ascertainment of facts and allows for the next step to be left to the courts, the exercise of such power would be non-judicial. The Australian High Court, at p 212, had expressly stated that the ascertainment of facts alone is not indicative of the exercise of judicial power as there was no determination of the legal rights and obligations of parties; and

G (d) the court went on to state:

H But, nevertheless, administrative authorities have been created for the purpose of ascertaining facts, supplementing the courts, and entrusted with power to make at least initial determinations in matters within, and not outside, ordinary judicial power. ... *Consequently, it is not an exclusive attribute of judicial power that all determinations of fact in matters affecting public or*

I

> *private rights shall be made by some court in which judicial power has been vested. No-one doubts that the ascertainment or determination of facts is part of the judicial process, but that function does not belong exclusively to the judicial power*. The true function of judicial power is, as already indicated, to investigate, declare and *enforce rights* and obligations on present or past facts, by whatever authority such facts are ascertained or determined, and under laws supposed already to exist. (Emphasis added.)

BINDING EFFECT OF THE SAC'S RULING(S)

[304] Much argument was advanced by learned counsel for the applicant about the binding effect of the SAC's ruling. It was submitted that it precludes the court from deciding the law applicable in the case before it and therefore the SAC usurps the courts power to interpret and apply the law in the case before the court.

[305] With respect, we disagree with the submission. In *Rola Co (Australia) Pty Ltd*, cited by learned counsel for the respondent and all the interveners, Regulations made under the National Security Act empowered a board to determine whether females might be employed on certain classes of work, and to decide, inter alia, matters related to their hours and conditions of employment and rates of pay. The board's decision is binding on specific employers, employees and industrial organisation and had the effect of an award or an order by Arbitration Court.

[306] The High Court of Australia held that the mere fact a decision is binding did not mean that there is an exercise of judicial power. The court said:

> In the same way it should, in my opinion, be held that the provision in reg 5c that a determination made by a Committee shall be binding on certain persons *does not, by reason of the use of the word 'binding,' involve an exercise of the judicial power of the Commonwealth*. (Emphasis added)

[307] In this connection, we think it is appropriate for the court to make a comparison to the mandatory sentencing regime under various penal laws where the court is required to impose a specific term of imprisonment. One of the arguments advanced in challenging the constitutional validity of the mandatory sentencing regime is that it strips a court of the discretion which it ordinarily has in deciding what punishment or penalty is appropriate in the light of the offence and the particular circumstances in which it was committed. Sentencing is pre-eminently the prerogative of the courts. Therefore, mandatory sentencing constitutes invasion of the domain of the Judiciary by the Legislature. A criminal trial before an ordinary court requires, among others, an independent court which is empowered in the event of a

conviction, to weigh and balance all factors relevant to the crime, the accused and the interest of society before imposition of sentence. This principle is firmly entrenched in law

[308] An interesting South African case in this context is *S v Dodo* 2001 SACR 594 (CC). Buzani Dodo was found guilty of raping and murdering an elderly woman. Section 51(1) of the Criminal Law Amendment Act, 105 of 1997 makes it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under s 51(3)(a), the court is satisfied that 'substantial and compelling circumstances' exist which justify the imposition of a lesser sentence. The Eastern Cape High Court declared the section in question to be constitutionally invalid, because it was inconsistent with s 35(3)(c) of the South Africa Constitution, which guarantees to every accused person 'a public trial before an ordinary court' and was also inconsistent with the separation of powers required by the Constitution. The High Court's reasons for coming to the conclusion that the provisions of s 51(1) of the Act 'undermine the doctrine of separation of powers and the independence of the Judiciary' and are inconsistent therewith are summarised in para 61 of the judgment as follows:

> A sentence of imprisonment for life, irrespective of the policies and procedures to which such sentence may be subjected by the Department of Correctional Services, must be regarded by the Court imposing it as having the potential consequence, at the very least, that the accused so sentenced will indeed be incarcerated until his death. It is an extreme sentence. It is the most severe sentence which may lawfully be imposed on an accused such as the one now before Court. It is a sentence which, in the ordinary course, requires a meticulous weighing of all relevant factors before a decision to impose it can be justified. [... W]hatever the boundaries of separation of powers are eventually determined to be, the imposition of the most severe penalty open to the High Court must fall within the exclusive prerogative and discretion of the Court. It falls within the heartland of the judicial power, and is not to be usurped by the Legislature.

[309] Dealing with the provision of the Constitution, the High Court observed, that '[s]entencing is pre-eminently the prerogative of the courts', that the section of the Act in question 'constitutes an invasion of the domain of the Judiciary not by the Executive, but by the Legislature' and that a criminal trial before an ordinary court requires, among other things, 'an independent court which is empowered ... in the event of a conviction, to weigh and balance all factors relevant to the crime, the accused and the interests of society before the imposition of sentence.'. The court concluded that this:

> ... is not a trial before an ordinary court ... [but] ... a trial before a court in which, at the imposition of the prescribed sentence, the robes are the robes of the judge, but the voice is the voice of the Legislature.

[310] The Constitutional Court of South Africa reversed the High Court's decision, saying that there is no absolute separation of powers between judicial functions, on the one hand, and the Legislature and Executive on the other. The Executive and Legislative branches of a state have a very real interest in the severity of sentences. The Executive has a general obligation to ensure that law abiding persons are protected, if needs be, through the criminal laws from persons who are bent on breaking the law. The executive and legislative branches must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect the society.

[311] More importantly, the Constitutional Court held, that the regime, inter alia, of prescribing minimum sentence under s 51(1) of the Criminal Law Amendment Act 105 of 1997, is not inconsistent with the separation of power principle under the Constitution.

[312] A similar point was considered by the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648. The issue concerns s 15 of a Singapore statute which provides for penalties for trafficking, importing and exporting drugs that were graduate according to the quantity of the drug involved. Heroin attracted the death penalty where the quantity involved was 15g or more. The defendant argued that the mandatory death sentence was unconstitutional. One of the arguments put forward was that the mandatory death penalty that excludes from the judicial function all considerations peculiar to the defendant in imposing sentence was wrong. In other words, standardisation of the sentencing process which left little room for judicial discretion to take account of variations in culpability within single offence categories results in a function which ceases to be judicial.

[313] The Privy Council rejected the argument. Lord Diplock pointed out at p 672 that there is nothing unusual in a capital sentence being mandatory, noting that at common law 'all capital sentences were mandatory'. His Lordship went on to say at p 673 that, if the argument were valid, it would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital — a consequence which His Lordship was plainly not prepared to accept.

[314] Lord Diplock's decision was followed in Malaysia in *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157. In this case, the Federal Court considered the following question:

> Whether or not the mandatory death sentence provided under s 57(1) of the Internal Security Act 1960 is *ultra vires* and violates arts 5(1), 8(1) and 121(1) of the Federal Constitution.

The Federal Court then held, as follows:

> Held:
>
> (1) it is clear from art 5(1) of the Federal Constitution that the Constitution itself envisages the possibility of Parliament providing for the death penalty so that it is not necessarily unconstitutional;
>
> ...
>
> (4) Capital punishment is not unconstitutional per se. In their judicial capacities, judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made;
>
> (5) All criminal law involves the classification of individuals for the purposes of punishment. Equality before the law and equal protection of the law require that like should be compared with like. What our art 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances. Everybody charged under s 57(1) of the Internal Security Act 1960, is liable to the same punishment and therefore, it is not discriminatory;
>
> (6) It is the function of the Legislature not the Judiciary to decide the appropriate punishment for persons charged under the Internal Security Act and the Arms Act. Provided that the factor which Parliament adopts as constituting the dissimilarity in circumstances which justifies dissimilarity in punitive treatment is not purely arbitrary but bears a reasonable relation to the object of the law there is no inconsistency with art 8(1) of the Constitution. Article 8(1) is concerned with equal punitive treatment for similar legal guilt, not with equal punitive treatment for equal moral blameworthiness;
>
> (7) There is nothing unusual in a capital sentence being mandatory and indeed its efficacy as a deterrent may to some extent be diminished if it is not.

[315] In the Australian case of *Palling v Corfield* (1970) 123 CLR 52, the brief facts are these: Under s 49(a) of the National Service Act 1951 (Cth), a person who was convicted of the offence of failing to respond to a national service notice was liable to a fine ranging from $40 to $200 and, at the request of the prosecutor, an additional mandatory sentence of seven days imprisonment if the defendant continued to refuse to comply with the requirements of national service. The High Court was unanimous in rejecting an argument that the mandatory imposition of the additional penalty was a contravention of the separation of powers. The court held that the subsection did not confer part of the judicial power of the Commonwealth on the prosecution or constitute an interference with judicial functions or attempt to delegate legislative power to the prosecution. Legislative power by way of prescribing penalty was likened to the legislative power in determining the elements of the offence.

Barwick CJ (at p 58) stated:

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament.

[316] The Chief Justice concluded his remarks on this point by stating, 'It is not ... a breach of the Constitution not to confide any discretion to the court as to the penalty imposed'. The Chief Justice also rejected an argument that it was the prosecutor who effectively imposed the sentence.

[317] Another similar situation is the case of mandatory order. In *The State (at the Prosecution of Martin O'Rourke) v James A Kelly and The Attorney General* [1983] IR 58, the Irish Supreme Court examined s 62(3) of the Housing Act 1966, on the basis that it was an unconstitutional invasion of the judicial power. Section 62 established that a housing authority, Dublin Corporation in this case, may recover an abode provided by it, with sub-s (3) continuing to state that that '... the justice shall, in such case he is satisfied that the demand mentioned in the said sub-s (1) has been duly made, issue the warrant'. Thus, it was argued that the judge had been deprived of his discretion over the matter and accordingly was an intrusion by the Legislature into the affairs of the Judiciary. The Supreme Court rejected this contention as they believed it was clear that s 62(3) 'did not attempt to convert the District Court judge into a mere rubber stamp'. O'Higgins CJ delivered the judgment of the court:

> It will be seen that it is only when the provisions of sub-s 1 of s 62 have been complied with and the demand duly made to the satisfaction of the District Justice that he must issue the warrant. In other words, it is only following the establishment of specified matters that the sub-section operates. This is no different to many of the statutory provisions which, on proof of certain matters, make it mandatory on a court to make a specified order. Such legislative provisions are within the competence of the Oireachtas.

[318] It would seem to this court, by parity of reasoning that Parliament is

competent to vest the function of the ascertainment Islamic law in respect of Islamic banking in the SAC and such ascertainment is binding on the court. It was likened to the legislative power in prescribing the minimum sentence to be imposed by the court on a convicted person(s). The function of the SAC is merely to ascertain the Islamic law for Islamic banking, and upon such ascertainment, it is for the court to apply the ascertained Islamic law for banking to the facts of the case. The ascertainment of Islamic Law for banking does not settle the dispute between the parties before the court. The SAC did not determine or pronounce authoritative decision as to the rights and/or liabilities of the parties before court. It did not convert the High Court into a mere rubber stamp.

[319] The process of ascertaining Islamic law for Islamic banking was described by the learned judge in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2012] 7 MLJ 597; [2012] 3 CLJ 249 as follows (at para 23):

> Looking at the purpose of s 56 of Act 707, it is clear that SAC is required to ascertain the applicable Islamic law to the above Shariah issues. *Upon ascertainment of the Islamic law, the court would then apply it to the facts of the present case*. This approach is in consonance with the decision in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor* [2009] 6 MLJ 839, where Raus Sharif JCA (as he then was) stated:
>
> > In this respect, it is our view that judges in civil courts should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise ...

[320] Earlier, in *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor*, the same judge had carefully delineated the function discharged by the SAC as opposed to the function of the civil court. The critical feature that decides that the SAC does not perform a judicial function it that it does not give a final decision in the dispute between the parties. The learned judge observed as follows (at para 102):

> The SAC cannot be said to perform a judicial or quasi-judicial function. The process of ascertainment by the SAC has no attributes of a judicial decision. The necessary attribute of the judicial decision is that it can give a final judgment between two parties which carries legal sanction by its own force. It appears to the court that before a person or persons or a body or bodies can be said to exercise judicial powers, he or it must be held that they derive their powers from the state and are exercising the judicial power of the state. An attempt was made to define the words 'judicial' and 'quasi-judicial' in the case of *Cooper v Wilson and others* [1937] 2 KB 309. The relevant quotation reads:
>
> > A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) the presentation (not necessarily orally) of their case by the parties to the dispute; ... (4) *a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law*

of the land to the facts so found, including where required a ruling upon any disputed question of law. (Emphasis added.)

[321] It is axiomatic that the SAC does not finally dispose of the dispute between the parties. It does not engage in the judicial process of determining the rights of the parties. This is made clear in the Manual issued by Bank Negara called the *Manual for References to Shariah Advisory Council by the Civil Court and Arbitrator* (see copy exhibited as 'MZKN2' of the BNM's affidavit dated 23 April 2018). In Part B, para 7 of the manual it is clearly stated as follows:

> [In] answering the questions referred by the court or arbitrator, the Shariah Advisory Council is aware that its role is merely to ascertain the 'hukum Syarak' (Islamic law) in relation to the issues where reference is made. The Shariah Advisory Council does not have any jurisdiction to make any finding of facts or to apply a particular 'hukum' (principle) to the facts of the case or to make a decision. Whether in relation to an issue or for the case since such jurisdiction is vested with the court and arbitrator.

[322] It is relevant to note that in the present case in giving its ruling under s 57, the SAC had scrupulously adhered to this principle. In the opening paragraph of the ruling (see p 300 of AR Vol 2), the SAC stated as follows:

> In answering to the question posed by the Court, the SAC took note that the SAC's duty is merely to analyse the Syariah's issues that are contained in each question posed and to sate the Hukum Syarak ruling relating to the question. The SAC does not have jurisdiction to make a finding of facts or to apply the ruling to the facts of the case and to decide whether relating to an issue or for the case because this jurisdiction is vested with the Court.

[323] It is clear acknowledgement by the SAC that it does not have the jurisdiction to enter into the dispute between the parties by itself 'applying the ruling to the facts of the case' and coming to a final decision on the dispute. Further, we agree with the submission of learned counsel for the respondent that the duty to ascertain of Islamic law is conferred on the Legislature and the SAC is the Legislature's machinery to assist in resolving disputes in Islamic banking. It does not exercise judicial power at all.

[324] In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] ALR 449; (1970) 123 CLR 361, cited by learned counsel for the respondent in her argument, it was observed as follows (see p 377):

> Thus the work of the Tribunal is work which would be appropriate for the Legislature itself to do if it had the time to consider individual cases. It would be obviously impracticable for the Parliament to apply its own ideas as to what is contrary to the public interest, either by passing a special Act for every individual case or by laying down a definition which in every case would be sure to produce a

A result satisfactory to it. There is probably no practicable alternative to setting up an authority which with some but incomplete guidance from the Legislature will apply its own notions concerning the public interest. This course the Trade Practices Act adopts, contenting itself with prescribing the qualifications for membership of the Tribunal, giving a limited measure of guidance, and then relying upon the B Executive's choice of members to ensure, so far as assurance is possible, that the notions applied will be such as the Parliament would approve. ... None of the powers of the Tribunal, then, involves any adjudication upon a claim of right.

[325] Similar observations were made in *Federal Commissioner of Taxation v* C *Munro* and *British Imperial Oil Co Ltd v Federal Commissioner of Taxation*, where it was held at pp 178–179:

Other matters may be subject to no *a priori* exclusive delimitation, but *may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary* D *elections, or claims to register trademarks would be instances of this class*. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances. *Deny that proposition, and you seriously affect the* recognized working of representative government. Admit it, and the provision now under consideration is fully sustained. E (Emphasis added.)

[326] It is clear, therefore, that it is open to the Legislature to establish the SAC as part of regulatory statute and to vest it with power to ascertain Islamic law for the purpose of banking. This point has been very ably considered by my F learned brother Justice Azahar Mohamed FCJ in his supporting judgment.

[327] Learned counsel for the respondent further submitted that disputes in Islamic financial and banking matters are within the jurisdiction of the civil G courts, notwithstanding that Shariah law are involved. This is due to the fact that Islamic banking and financial disputes do not and cannot fall within the jurisdiction of Shariah Courts as finance and financial institutions are matters within the List I (Federal List) and outside of the List II (State List). Furthermore, financial institutions (and some of their customers) do not H profess the religion of Islam.

[328] According to learned counsel for the respondent, we have a scenario where matters lie within the jurisdiction of civil courts, but the civil courts are not equipped to make findings on Islamic law.

I

[329] With the greatest respect and deference to the learned judges of the civil courts, we are of the humble opinion that the civil courts are not sufficiently equipped to make findings on Islamic law. The same sentiments were expressed in the following cases:

(a) in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22, the Court of Appeal held at pp 853–854 (MLJ); pp 17–18 (CLJ):

> In this respect, *it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the religion of Islam or otherwise*. As rightly pointed out by Suriyadi J (as he then was) in *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulama' take years to comprehend'. Thus, *whether the bank business is in accordance with the religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence*. (Emphasis added.)

(b) in *Tan Sri Abdul Khalid bin Ibrahim* the High Court held at pp 614–615:

> Before I conclude, perhaps it would be useful for me to add a few words as to why civil courts may not be sufficiently equipped to deal with the issue whether a transaction under Islamic banking is in accordance to the religion of Islam or otherwise. *Civil courts are not conversant with the rubrics of Fiqh Al-Muamalat which is a highly complex yet under-developed area of Islamic jurisprudence. In applying Islamic law to determine the parties right under a contract, a civil judge had to conduct an extensive inquiry into Islamic law and make an independent determination of Shariah principles*.(Emphasis added.)

[330] In order to appreciate whether a civil judge is competent to decide on Shariah issues relating to Islamic banking and finance, perhaps an understanding of the sources of Shariah is very important.

[331] In this connection, we may advert to an article entitled: *A Study on the Shariah decision making Processes adopted by the Shariah Committee in Malaysian Islamic Financial Institutions*, co-authored by Mohamad Asmadi Abdullah, Rusni Hasssan, Muhammad Naim Omar, Mohammed Deen Mohd Napiah, Ahmad Azam Othman, Mohammed Ariffin and Adnan Yusuf, (Australian Journal of Basic and Applied Sciences, 8(13) August 2014, pp 670–675). The relevant passages in this regard, being of considerable significance to our analysis, are extracted in full as hereunder:

> Shariah or Islamic law has been defined as the sum total of Islamic teaching and system, which was revealed to Prophet Muhammad s.a.w recorded in the Qur'an as well as deducible from the Prophet's divinely guided lifestyle called the sunnah (Akram, 2008). The Qur'an and the sunnah contain rules and regulations revealed by Allah swt and these two are known as the primary sources of Islamic Law. Al-Quran, Sunnah and Ijma' are transmitted proofs and their authority and binding force are independent of any rational justification (Kamali, 2004). *Qiyas* is another primary source but it is a rational proof because its validity is founded on an established hukm of the Qur'an, Sunnah or *Ijma'* (Akram, 2006). The commonality

of the illah in *qiyas* is matter of opinion and *ijtihad* (Kamali, 2004). The authority of these four sources is based on the Qur'anic verse which addresses the command to the Muslims to refer to these sources to find solutions for disputes or issues. Allah SWT says: 'O you who believe! Obey Allah SWT and obey the Prophet (Muhammad), and those charged with authority among you. And if you differ over anything among yourselves, refer it to Allah SWT (Al-Quran) and the Prophet (Al-Sunnah)'. (*Surah al- Nisa*': 59). It is also based on the Allah SWT also says: 'And whatever the Prophet has given you — take it; and what He has forbidden you (from doing) — refrain from it'. (*Surah al-Hasyr*: 7)(IBFIM, Internet).

The development of the Shariah also relies on other sources which are termed as the secondary sources. These sources are formulated by the scholars based on their deep understanding of the primary sources. These sources are needed because there are a lot of new cases which did not occur during the time of the Prophet saw and hence, new *ijtihad* is necessary in order to find the ruling. These sources are like *qiyas*, *maslahah*, *istihsan*, *istishab*, *saddzari'ah*, '*urf*, *maqasidshar'iyyah*, *siyasahshar'iyyah* and many more. The basis for these secondary sources is a *hadith* of the Prophet s.a.w when he appointed Muaz as a judge in Yemen. The Prophet saw asked Muaz that what he would do to solve disputes while in Yemen. The Prophet s.a.w said: 'How will you judge when the occasion of deciding a case arises?' He replied; I shall judge in accordance with Allah's Book. The Prophet PBUH then asked him, 'What will you do if you do not find guidance in Allah's Book? He replied: I will act in accordance with the Sunnah of the Prophet saw The Prophet PBUH asked him again, 'What will you do if you do not find guidance in the Sunnah of the Prophet saw? He replied: I shall do my best to form an opinion and spare no pains. The Prophet saw then patted him on the breast and said: 'Praise be to Allah swt who helped the Messenger of Allah swt to find a thing which pleases the Prophet saw' (Nyazee, 2002).

Ijtihad means striving to the utmost to discover the law from the texts through all possible means of valid interpretation (Nyazee, 2002). Its validity is derived from divine revelation and hence is always in harmony with the Qur'an and the Sunnah (Kamali, 1991). The scholar who performs *ijtihad* must possess the appropriate qualification such as the knowledge of the sources of the Shariah, knowledge of Arabic and familiarity with the prevailing customs of society, upright character, as well as the ability to formulate independent opinion and judgment (Kamali, 2006). As far as the modern transaction is concerned, the *ijtihad* is significant in order to extend the ruling to new cases that are not covered clearly by the Qur'an and the Sunnah. Therefore the function of the *mujtahid* to derive the new ruling for the new case from the general principles available in the Qur'an and the Sunnah. The *mujtahid* is therefore must open their minds to the current development and realities and to interpret the whole text in its totality by looking at the objectives of the Shariah in order to materialise its ultimate objectives in any particular issue. (Islamic Capital Market, 2009).

(See also Fathullah Al Haq Muhamad Asni & Jasni Sulong, 'The Model of Instinbat by the Shariah Advisory Council of Central Bank Malaysia'. (International Journal of Academic Research in Business and Social Science, Vol 8, No 1 January 2018).

[332] We agree with the contention of learned counsel for the first intervener that the SAC has been harmonising the proliferation of Shariah opinions in the industry since its inception. It has already accustomed to the practical considerations at hand and the need for certainty in the industry on Islamic banking principles. Therefore, the binding nature of the ruling of the SAC is justified as s 56 of the 2009 Act was enacted on the reason of conserving and protecting the public interest.

[333] It is pertinent to note that the rulings of the SAC are made given through the exercise of collective *ijtihad*. The SAC comprises prominent scholars and Islamic finance experts, who are qualified individuals with vast experience and knowledge in various fields, especially in finance and Islamic law, to ensure robust and comprehensive deliberation before the issuance of the rulings.

[334] The appointment of the members of the SAC is provided for in s 53 of the 2009 Act. Section 53(1) states that the Yang di-Pertuan Agong, may on the advice of the minister after consultation with the bank, appoint from among persons who are qualified in Shariah or who have knowledge or experience in the Shariah and in banking, finance, law or such other related disciplines as members of the SAC. Judges of Civil and Shariah Courts can also be appointed as members of the SAC. However, if a judge is to be appointed as an SAC member, the appointment must be done in accordance with s 53(2) which says that:

> If a judge of the High Court, the Court of Appeal or the Federal Court, or a judge of the Shariah Appeal Court of any State or Federal Territory, is to be appointed under subsection (1), such appointment shall not be made except — (a) in the case of a judge of the High Court, the Court of Appeal or the Federal Court, after consultation by the Bank with the Chief Justice; and (b) in the case of a judge of the Shariah Appeal Court of any State or Federal Territory, after consultation by the Bank with the Chief Shariah Judge of the respective State or Federal Territory, as the case may be.

SEMENYIH JAYA CASE

[335] We now turn to the *Semenyih Jaya* case. In the course of his argument, learned counsel for the applicant emphatically relied on the decision of *Semenyih Jaya* case in support of his contention that that the impugned provisions are unconstitutional and liable to be struck off. We agree with the submissions of learned counsel for the respondent and the interveners that *Semenyih Jaya* case does not support the position being advanced by the applicant that the conferment of the power to ascertain the Islamic law for Islamic banking on the SAC is an incursion into the judicial power of the Federation. The factual matrix in *Semenyih Jaya* case is poles apart from the factual matrix of the case under our consideration. In *Semenyih Jaya* case, the

impugned s 40D of the Land Acquisition Act 1960 provided for the final decision on compensation for compulsory acquisition to be determined not by the judge but by the two assessors sitting with him in the High Court.

[336] In short, the offending part of s 40D was that it empowers the assessors, and not the judge to determine conclusively, and therefore finally, the very issue before the High Court, namely, the amount of compensation to be awarded to the landowner.

[337] The test is whether there has been a 'take-over of the judicial power of the court' by non-judicial personages. Zainun Ali FCJ explained why s 40D was an encroachment of the judicial power at para 95):

> (I)n our view, s 40D of the Act has a wider reach. The implications of the language of s 40D(1) and (2) of the Act is that the assessors in effect take over the judicial power of the court enshrined under art 121(1) of the Federal Constitution in deciding on a reasonable amount of compensation in land reference matters. The judicial power to award compensation has been whittled away from the High Court judge to the assessors in breach of art 121 of the Federal Constitution.

[338] It is clear, therefore, the test is whether the very matter placed before the court of law as the dispute between the parties for final decision has been usurped by persons other than judges. In a land reference case under the Land Acquisition Act 1960, the dispute is over the amount of compensation. Section 40D permits the assessors to decide finally on this very issue. The Federal Court observed further at paras 51–52:

> It would appear that he (the judge) sits by the side-line and dutifully anoints the assessors' decision. Section 40D of the Act therefore effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it. This power to decide a matter which is brought before the court is known as judicial power and herein lies the rub.

[339] Unlike the assessors in the Land Reference Proceedings, the SAC in ascertaining the Islamic law for Islamic banking, does not conclusively and finally determine the right between the parties. The contest between parties remain with the adjudicating judge.

REFERENCE QUESTION 1(c)

[340] This reference question was not vigorously pursued by learned counsel for the applicant. Be that as it may, for the sake of completeness, we will discuss the issues raised by the applicant. The nub of learned counsel for the applicant's submission on this issue is that the impugned provisions deprived a litigant substantive process. The short answer is this. Article 8 of the FC deals with equality before the law and equal protection of the law and that equality means

that people who are in the like circumstances should be treated equally. Numerous cases in the apex court confirm that art 8 does not apply to all persons in any circumstances but rather it applies to person under like circumstances.

[341] In order to determine whether a law is discriminatory under art 8, 'the validity of a law relating to equals can therefore only be properly tested if it applies alike to all persons in the same group' (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257).

[342] In the case of a reference made pursuant to s 56(1)(b) of the 2009 Act, parties involved are allowed to provide their own Shariah expert's views on the Shariah question(s). In fact, in these present applications, the applicant provided to SAC its own Shariah expert's view on the issue.

REFERENCE QUESTION 2(a)

Expert evidence

[343] Learned counsel for the applicant finally contended that if the impugned provisions are constitutional, the party should be entitled to lead expert evidence and for the court to consider expert evidence on question concerning Islamic law for Islamic financial business.

[344] We are not persuaded with the submission. The civil courts are not in a position to appreciate and determine the divergences of opinions among the experts and to decide based on Shariah principles. The proposition has been expounded in *Mohd Alias* where the learned judge observed that:

> 122. There is neither rhyme nor reason for the court to reject the function of the SAC in ascertaining which Islamic law to be applied by the civil courts in deciding a matter. Should this function be ignored, it would open the floodgate for lawyers and cause a tsunami of applications to call any expert at their own interest and benefit, not only from Malaysia but also other countries in the world who might not be familiar to our legal system, administration of Islamic law and local conditions just to challenge the Islamic banking transaction in this country.

[345] The same sentiment has been repeated by the learned judge in the case of *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2012] 7 MLJ 597; [2012] 3 CLJ 249:

> [55] In my considered opinion, it is advisable and practical that the question as to whether Islamic banking business is in accordance with the religion of Islam or otherwise be decided by eminent jurists properly qualified in Islamic jurisprudence and not by judges of the civil courts. This is to avoid embarrassment to Islamic banking cases as a result of incoherent and anomalous legal judgments. The

A applicable law to Islamic banking has to be known with certainty. Otherwise, lawyers, bankers and their customers are left to wonder which is in fact the correct law.

[56] Even if expert evidence is allowed to be given in court to explain or clarify any point of law relating to Islamic banking, civil judges would be in a difficult situation B to decide because the divergence of opinions among Islamic jurists and scholars to which the opposing experts might have and which they will urge the court to adopt may be so complex to enable civil judges to make an independent determination of Shariah principles.

C **[346]** Further, if the parties are allowed to lead expert evidence, it would fall upon the civil courts to ascertain what the applicable Islamic law for the Islamic banking is, and to proceed to apply the ascertained law to the facts of the case. In ascertaining the law, competing parties to the dispute will submit before the courts their own views of what is the law. In such circumstances, the practical D questions need to be addressed are:

(a) to what source would a judge refer to;

(b) which *mazhab* should he or she adopt if there are differing opinions among the experts; and

E

(c) would civil law or Shariah law be the applicable law.

[347] In our considered opinion, the use of expert evidence would not be helpful to a civil court judge as ultimately, the civil court judge would still have F to make a decision and he or she would end up having to choose which expert opinion to rely on, and this could be further complicated if each expert based his or her opinion on different schools of jurisprudence.

[348] We are of the firm opinion that it is for a body of eminent jurists, G properly qualified in Islamic jurisprudence and/or Islamic finance, to be the ones dealing with questions of validity of a contract under Islamic law and in Malaysia that special body would be the SAC.

[349] My learned brothers Ahmad Maarop, PCA, Ramly Ali, FCJ Azahar H Mohamed FCJ and my learned sister Alizatul Khair Osman Khairuddin FCJ have read this majority judgment in draft and have expressed their agreement with it.

CONCLUSION

I

[350] For the foregoing reasons, the impugned provisions are not in breach of the FC and unconstitutional on either basis advanced by learned counsel for the applicant. We answer the questions referred to us for our determination as follows:

No 1:

(a) in the negative;

(b) in the negative; and

(c) in the negative.

No 2 (alternative question):

In the negative.

[351] We order that this case be remitted to the High Court for further directions.

By majority, FC not breached and ss 56 and 57 of the CBMA constitutional.

Reported by Ashok Kumar